TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 643

BENTLEY W. WARREN AND CHARLES W. MULCAHY, AS THE TRUSTEES OF THE PROPERTY OF BOSTON AND PROVIDENCE RAILROAD CORPORATION, PETITIONERS,

vs.

HOWARD S. PALMER ET AL., AS THE TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND OLD COLONY RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 13, 1940.

CERTIORARI GRANTED MARCH 4, 1940.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

In Proceedings for the Reorganization of a Railroad.

APPEAL OF BOSTON AND PROVIDENCE RAILROAD CORPORATION, AND BENTLEY W. WARREN AND CHARLES W. MULCAHY, AS THE TRUSTEES OF THE PROPERTY OF BOSTON AND PROVIDENCE RAILROAD CORPORATION, FROM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT OVERRULING JURISDICTIONAL OBJECTIONS OF BOSTON AND PROVIDENCE RAILROAD CORPORATION TO THE PETITION OF HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, AS THE TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND OF OLD COLONY RAILROAD COMPANY, FOR A CHARGE UPON THE EARNINGS AND PROPERTY OF BOSTON AND PROVIDENCE RAILROAD CORPORATION FOR ADMINISTRATION FOR THE PERIOD JUNE 4, 1936, TO DECEMBER 31, 1937.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

Statement Under Rule XIII.

These reorganization proceedings were commenced on October 23, 1935, by the filing in the United States District Court for the District of Connecticut on that date of a petition of The New York, New Haven and Hartford

Railroad Company for reorganization under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, as amended. On that date an order approving said petition as properly filed was entered by the Honorable Carroll C. Hincks, United States District Judge for the District of Connecticut. On November 8, 1935, Howard S. Palmer, Winthrop M. Daniels and James Lee Loomis were appointed the Trustees of the property of The New York, New Haven and Hartford Railroad Company and they duly qualified as such on December 7, 1935.

5 On June 2, 1936, said Trustees rejected the lease dated February 15, 1893, from Old Colony Railroad Company to The New York, New Haven and Hartford Railroad Company, and on the next day Old Colony Railroad Company filed in the same proceedings a petition for reorganization under said Section 77 and said petition was approved as properly filed by an order entered by said District Judge. The same persons who were acting as the Trustees of the property of The New York, New Haven and Hartford Railroad Company were appointed as the Trustees of the property of Old Colony Railroad Company on June 18, 1936 and they duly qualified as such on

6 November 28, 1936. On February 24, 1937, Winthrop M. Daniels was relieved of all further responsibility and trust as a Trustee of said properties, and on March 10, 1937, Henry B. Sawyer was appointed one of the three Trustees thereof to succeed him and duly qualified as such on April 9, 1937.

On May 26, 1937, Boston and Providence Railroad Corporation filed a petition for leave to intervene generally as a party to the reorganization proceedings, and on the following day its petition was granted.

On July 19, 1938, the Trustees of the property of Old Colony Railroad Company rejected the lease dated April 7, 1888, from Boston and Providence Railroad Corpora-

tion to Old Colony Railroad Company. On July 27, 1938, the Trustees of the properties of The New York, New Haven and Hartford Railroad Company and of Old Colony Railroad Company filed their petition (Petition for Order No. 301) for a charge upon the earnings and property of Boston and Providence Railroad Corporation for administration for the period from June 4, 1936, to December 31, 1937, both dates inclusive, notice of which was received by Boston and Providence Railroad Corporation on August 8, 1938. Bankers Trust Company, as Trustee under the First and Refunding Mortgage dated December 9, 1920, of The New York, New Haven and Hartford Railroad Company, filed its answer to this petition on August 9, 1938.

On August 4, 1938, The Provident Institution for Savings in the Town of Boston filed its petition in the District Court of the United States for the District of Massachusetts for the reorganization of Boston and Providence Railroad Corporation under said Section 77, and on the following day an order approving said petition as properly filed was entered by the Honorable Francis J. W. Ford, United States District Judge for the District of Massachusetts. Subsequently, by order entered August 22, 1938, Bentley W. Warren and Charles W. Mulcahy were appointed the Trustees of the estate of Boston and Providence Railroad Corporation and duly qualified as such on October 18, 1938.

On October 31, 1938, Boston and Providence Railroad Corporation filed a statement of jurisdictional objections to said Petition for Order No. 301, and trial of the issues so raised was had on November 14, 1938, before the Honorable Carroll C. Hincks, who on January 16, 1939, entered an order overruling said jurisdictional objections. The present appeal is concerned with this order.

By order entered February 14, 1939, said Trustees of the estate of Boston and Providence Railroad Corporation were permitted to intervene specially in these pro-

ceedings and were admitted and constituted as a party thereto for the limited purpose of joining in and prosecuting an appeal from the decision and order entered January 16, 1939, overruling jurisdictional objections to said Petition for Order No. 301, and of defending against the claims contained in said Petition. This appeal was taken on February 14, 1939, by the filing, with the District Court of the United States for the District of Connecticut, of appellants' Notice of Appeal.

The original parties and those who have become parties before this appeal are as follows: Boston and Providence Railroad Corporation (which, together with said Bentley W. Warren and Charles W. Mulcahy, as the Trustees of the estate of Boston and Providence Railroad Corporation, are the appellants herein). Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as the Trustees of the properties of The New York, New Haven and Hartford Railroad Company and of Old Colony Railroad Company; Bankers Trust Company, as Trustee as aforesaid; James H. Brewster, Jr., Harry C. Hagerty, Gladden W. Baker, Haughton Bell, Fred P. Hayward and Alfred H. Meyers, as they constitute the Committee representing a "Group of Insurance Companies Acting to Protect Their Interests in the Securities of The New York, New Haven and Hartford Railroad Company System"; and Bank of New York, as Trustee under The New England Railroad Company Consolidated Mortgage dated September 2, 1895, have been cited as the appellees herein. Various other parties have intervened in the reorganization proceedings, but did not appear at the hearing on the jurisdictional objections to said Petition for Order No. 301.

By Order of said District Court entered February 13, 1939, said Petition was set down for hearing upon the merits on April 3, 1939, and March 13, 1939, was fixed as the date on or before which the Trustees of Boston

and Providence Railroad Corporation might file their specific objections to the merits of said Petition.

Pursuant to said Order, Bentley W. Warren and Charles W. Mulcahy, as Trustees of Boston and Providence Railroad Corporation, appearing specially pursuant to their special intervention and without waiving their jurisdictional objections to said Petition, and without waiving their appeal from the Order of said District Court overruling said jurisdictional objections, filed their objections to the merits of said Petition on March 11, 1939. A hearing was commenced pursuant to said Order 14 on April 3, 1939, and was concluded on April 4, 1939, before the Honorable Carroll C. Hincks.

No party was arrested, or bail taken, or property attached, or arrested, and no question was referred on or subsequent to July 27, 1938 (the date when said Petition for Order No. 301 was filed).

15

16

Petition.

(Filed October 23, 1935)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF CONNECTICUT.

In Proceedings for the Reorganization of a Railroad.

17

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

No. 16,562.

PETITION FOR ORDER No. 1.

18

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT:

The petition of The New York, New Haven and Hartford Railroad Company, a railroad corporation (hereinafter referred to as the "Debtor") respectfully represents:

(1) That the Debtor is a railroad corporation organized and existing under the laws of the states of Connecticut, Massachusetts and Rhode Island, and is a citizen and resident of the state of Connecticut; that it is a com-

mon carrier by railroad engaged in the transportation of persons and property in interstate commerce in the states of Connecticut, Massachusetts, Rhode Island and New York, and is not a street, suburban or interurban electric railway; that during the six months' period immediately preceding the filing of this petition the Debtor has had, and now has, its principal executive and operating office in the city of New Haven, Connecticut, in the District of Connecticut.

(2) That the Debtor has substantial amounts of taxes, 20
maturities (including sinking fund payments), interest payments, and leased line rentals becoming due during the remainder of the calendar year 1935, including amounts due January 1, 1936, in the following amounts:

Taxes falling due October 24 to January 1, 1936, inclusive	$ 4,426,330.00
Maturities, including bank loans, falling due October 25 to January 1, 1936, inclusive	6,217,600.00
Interest falling due October 25 to January 1, 1936, inclusive	3,506,383.00 21
Leased Line Rentals falling due November 1 to January 1, 1936, inclusive	958,173.00
Guarantees	517,448.00
Total,	$15,625,934.00

that Debtor's cash balance on October 21, 1935, was $3,037,306.85 and its cash from all sources during the remainder of the year is estimated at $21,547,000; that its necessary operating expenditures for the remainder of the year are estimated at $18,648,000 so that the amount available for the above charges aggregating $15,625,934 will be approximately $5,936,306.85.

That the Debtor is thus without sufficient funds to pay and discharge the aforesaid obligations as they mature, and on information and belief alleges that it has no means of borrowing or otherwise procuring such funds; that it is unable to meet its debts as they mature, and desires to effect a plan of reorganization pursuant to Section 77 of Chapter VIII of the acts of Congress relating to bankruptcy.

(3) That a copy of this petition is this day being filed
23 with the Interstate Commerce Commission.

(4) That the filing of this petition by and on behalf of the Debtor was duly authorized by resolution of the board of directors of the Debtor, adopted at a meeting therof duly held on the 23rd day of October, 1935.

WHEREFORE, your petitioner prays that an order may be entered approving this petition as properly filed under said Section 77 and that it be granted all other and further relief to which it may be entitled.

THE NEW YORK, NEW HAVEN AND HARTFORD
24 RAILROAD COMPANY,
By H. S. PALMER,
Its President.

W. W. MEYER,
Attorney for Debtor.

(Verification omitted in printing.)

25

Order dated October 23, 1935.

[SAME TITLE]

ORDER No. 1.

Upon due consideration of the petition of The New York, New Haven and Hartford Railroad Company, the above named Debtor, verified October 23, 1935, and filed herein this day, stating that such Debtor is unable to meet its debts as they mature and that it desires to effect 26
a plan of reorganization in accordance with Section 77 of Chapter VIII of the acts of Congress relating to bankruptcy, and the Court being satisfied that such petition complies with said section and has been filed in good faith, it is ORDERED:

(1) That said petition be, and it hereby is approved as properly filed under Section 77 of Chapter VIII of the acts of Congress relating to bankruptcy.

(2) That the Debtor be, and it hereby is authorized and directed, pending further order of this Court, to run, 27
manage, maintain, operate and keep in proper condition and repair the railroad and properties of the Debtor, wherever situated, whether in this state, judicial circuit, or elsewhere; to manage, operate and conduct its business, and to this end to exercise its authority, rights and franchises and to discharge its public duties; to employ or discharge and to fix the compensation of all its officers, counsel, attorneys, managers, superintendents, agents and employees; to collect and receive the income, rents, revenues, tolls, issues and profits, accrued or to accrue, from its railroad and properties; to collect all its outstanding accounts, and all dividends and interest on securities

belonging to it; to sell, convey, or lease property, real or personal, not needed in the operation of its railroad, and to exercise such rights of sale, conveyance, exchange and release as are reserved to, or available to it under its outstanding deeds of trust, mortgages, trust indentures, and similar instruments, and to use the proceeds of sale of released property as provided in such instruments, all in the same manner that it would be entitled to do in its own right; and, to the extent necessary to protect, preserve or benefit its railroad or properties or business,
29 to make and pay for additions and betterments thereto and thereof; all of the foregoing powers to be exercised by Debtor according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein.

(3) That the Debtor is authorized in its discretion, from time to time until further order of this Court, out of funds now or hereafter coming into its hands, to pay:

(a) All taxes and assessments due or to become due upon the properties, income, franchises or business of the Debtor;
30

(b) All necessary current expenses in operating the railroad, preserving the assets, and conducting the business of the Debtor, including among other expenses the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents, agents and employees retained by the Debtor; the payment of freight, ticket, switching, car mileage, per diem, switching reclaims, divisions, and all other interline accounts and balances; the adjustment, compromise or payment of claims for loss, damage or delay to freight,

for overcharges and for reparation; the payment of joint facility and equipment rental and expenses, and the payment of accounts for materials and supplies, also all sums now or which may hereafter become due to other persons or corporations for car or equipment repairs, or for the occupation or use, jointly or otherwise, of buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges, interlocking plants and other railroad facilities, and such sums as may be necessary to comply with the 32
obligations of the Debtor under contracts or leases by virtue of which such occupation or use may now or hereafter be enjoyed, but such payments shall not constitute affirmations of such contracts or leases, or any of them.

(c) Liabilities due and unpaid which were incurred by the Debtor within six months preceding the date of this Order in the usual and customary operation of its railroad and properties and the conduct of its business for wages, salaries, fees and similar charges, and for material, supplies 33
and equipment.

(d) Pending further order of the Court the Debtor also is authorized in its discretion to adjust, compromise, make advances for, pay or reimburse others for: claims for or arising out of loss, damage or delay to freight or baggage; overcharges; reparation; adjustments of or refunds for freight or other charges on shipments in connection with which there are transit or storage privileges; freight, ticket, switching, car mileage, per diem, switching reclaims and all other inter-

line accounts and balances; rental of equipment or rental of or expense arising from use or operation of or over joint or other facilities; outstanding checks for wages, fees or services; claims for personal injuries to employees which are preferred under the acts of Congress relating to bankruptcy; and other claims, charges or adjustments of similar character between Debtor and other carriers in the conduct of ~~their joint~~ business, between Debtor and its patrons and be-
35 tween Debtor and its employees; all regardless of when accrued.

(e) The cost of maintaining the corporate existence of the Debtor, including corporate, franchise, stamp and similar taxes, the necessary expense of keeping and preserving its corporate records, of maintaining transfer offices and agents, of registering and transferring its securities and of paying the proper charges and expenses of the trustees under indentures or mortgages pursuant to which securities of the Debtor have been
36 issued.

(f) All payments due from time to time on existing pension systems, and all group insurance carried in whole or in part by the Debtor.

(g) Court costs and costs incurred before various state and federal Commissions or other administrative boards or tribunals.

(h) The expense of printing pleadings, motions, petitions, orders and other documents now on file or hereafter filed in this case, in sufficient

quantities to provide copies thereof for the use of the Court, the Interstate Commerce Commission, the Debtor, parties to the cause, and others who may have a substantial interest therein; such expense to be taxed as costs in this case:

(4) That the Debtor, in its discretion, at any time prior to April 23, 1936, or prior to such other day as may be provided by further order of this Court, may disaffirm any of its existing contracts or leases. The disaffirmance of any such contract or lease shall be effective when notice 38
of such disaffirmance, together with proof of service or mailing of a copy or copies thereof by registered mail to the other party or parties to such lease or contract, shall be filed of record in this proceeding. The performance by Debtor of any such contract or lease within said period or future periods allowed for disaffirmance thereof shall not constitute or be evidence of the adoption or assumption of such contract or lease by Debtor or the waiver by it of its right to disaffirm the same.

(5) That pending further order of the Court in the premises the Debtor is authorized and empowered to 39
institute or prosecute in any court or before any tribunal of competent jurisdiction all such suits and proceedings as may be necessary in its judgment for the recovery or proper protection of its property or rights, and to make settlement of any thereof; and likewise to defend or to liquidate by written agreement or consent judgment, decree, order or award any claim, demand or cause of action whether or not suit or other proceeding to enforce the same has been or shall be brought in any court or before any officer, department, commission, board or tribunal, but no payments shall be made by the Debtor in respect of any such claims accruing prior to the date of

this order, or in respect of any actions, proceedings, or suits on such claims, without further order or direction of this Court, except such as may be permitted by this or other orders hereafter entered herein, and such as constitute preferred claims under the acts of Congress relating to bankruptcy; and no action taken by the Debtor in defense or settlement of such claims, actions, proceedings, or suits shall have the effect of establishing any claim upon, or right in, the property or funds in the possession of the Debtor that otherwise would not exist.

41 (6) The Debtor shall close its present books of account at midnight on October 23, 1935. The Debtor shall open new books of account at the beginning of the day of October 24, 1935, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the Debtor, and shall preserve proper vouchers or receipts for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the Debtor are presently deposited as shall be selected by the Debtor, or in such other bank or banks as shall be selected and approved by this Court.

42 (7) That, not later than November 30, 1935, the Debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of the close of business on October 23, 1935, and, within forty-five days after the close of each calendar month thereafter, shall file with said Clerk a statement of the assets and liabilities of the Debtor as of the close of business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the Debtor for the second preceding calendar month. All such statements shall be certified as correct by the chief accounting officer of the Debtor.

(8) That all persons, firms and corporations whatsoever, and wheresoever situated, located or domiciled, be and they hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties, or premises belonging to, or in the possession of the Debtor, or from taking possession of, or in any way interfering with the same, or any part thereof, or from interfering in any 44
manner with the operation of its railroad or properties or the carrying on of its business by the Debtor under the orders of this Court, or from commencing or continuing any suits against the Debtor wherein any bond, except a bond for costs, may be required of the Debtor herein, either during the pendency of said proceedings or of subsequent proceedings therein by appeal or otherwise: Provided, that suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction.

45

(9) That all persons and corporations holding collateral, including deposit balances or credits, heretofore pledged by the Debtor as security for its notes or obligations be and each of them hereby is restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, until further order of this Court.

(10) That the Debtor hereby is directed to give notice by mailing a copy of this Order to its mortgage trustees, and to cause a notice, directed to its creditors and stockholders, to be published within five days from the date

of the entry of this Order once in The New Haven Journal Courier, a newspaper published in the City of New Haven, and in The Hartford Daily Courant, a newspaper published in the City of Hartford, State of Connecticut, and in The Boston Herald, a newspaper published in the City of Boston, State of Massachusetts, and in The Wall Street Journal, a newspaper published in the City of New York, State of New York, and in The Providence Journal, a newspaper published in the City of Providence, State of Rhode Island, of a hearing to be held on November 6, 1935, at twelve o'clock noon, in the Court Room 47 occupied by this Court in the United States Court House, New Haven Connecticut, at which hearing, or any adjournment thereof, this Court will appoint one or more trustees of the Debtor's property. The notice of such hearing shall be substantially in the form of the notice annexed hereto, made a part hereof, and marked "Exhibit A."

When such mailing and publication has been completed the Debtor shall file with the Clerk of this Court its report with respect thereto.

48 (11) This Court reserves full right and jurisdiction to enter at any time such further orders in the premises as the Court may deem proper, including the right to amend, extend, limit, modify, or otherwise change or rescind the present order.

ENTER:

CARROLL C. HINCKS,
District Judge.

Dated, October 23, 1935.

"Exhibit A" Annexed to Order.

NOTICE TO ALL CREDITORS AND STOCKHOLDERS

OF

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

Pursuant to an order entered October 23, 1935, by the Honorable Carroll C. Hincks, Judge of the District Court of the United States for the District of Connecticut, notice is hereby given that a hearing will be held on November 6, 1935, at twelve o'clock noon, by said Judge, in the courtroom usually occupied by him in the United States Court House, New Haven, Connecticut, at which hearing the Court will, pursuant to the provisions of Section 77 of the Act entitled: "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and acts amendatory thereof and supplementary thereto, appoint one or more trustees of the property of said The New York, New Haven and Hartford Railroad Company.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Dated at New Haven, Connecticut,
October 23, 1935.

52

Proof of Mailing and of Publication Directed by Order No. 1 of October 23, 1935.

(Filed November 4, 1935)

[SAME TITLE]

Comes now the Debtor and respectfully reports to the Court:

1. That, pursuant to Order No. 1 of October 23, 1935, the Debtor has given notice of a hearing to be held by the
53 Court on November 6, 1935, at twelve o'clock noon, in its Court Room in the United States Court House, New Haven, Connecticut, for the appointment by the Court at such hearing or any adjournment thereof of one or more trustees of the Debtor's property, by mailing a copy of said Order to each of its mortgage trustees as follows:

(a) United States Trust Company,
Trustee under The New York, New Haven and Hartford Harlem River and Port Chester First Mortgage, dated May 16, 1904,
45 Wall Street,
54 New York, N. Y.

(b) Chase National Bank,
Trustee under New York, New Haven and Hartford Equipment Trust of 1934,
Pine Street, corner of Nassau Street,
New York City.

(c) Second National Bank of New Haven,
Trustee under New York, New Haven and Hartford Equipment Trust of 1930,
135 Church Street,
New Haven, Connecticut.

Proof of Mailing and of Publication Directed by Order No. 1 of October 23, 1935. 55

(d) First National Bank of Boston,
Trustee under New York, New Haven and Hartford Equipment Trust of 1925, New York, New Haven and Hartford Equipment Trust of 1927, No. 2,
Trust Indenture dated April 1, 1889 securing New York & New England Railroad Company Boston Terminal First Mortgage Bonds, New York, New Haven and Hartford Equipment Trust of 1931,
67 Milk Street, 56
Boston, Massachusetts.

(e) Irving Trust Company,
Trustee under New York, New Haven and Hartford Railroad Company Collateral Trust Indenture, dated April 1, 1925,
1 Wall Street,
New York City.

(f) Union & New Haven Trust Company,
Trustee under Branford Electric Company First Mortgage, dated October 1, 1897,
Church Street, corner Elm Street, 57
New Haven, Connecticut.

(g) Rhode Island Hospital Trust Company,
Trustee under Providence Terminal Company First Mortgage, dated March 1, 1906,
15 Westminster Street,
Providence, Rhode Island.

(h) City Bank Farmers Trust Company,
Trustee under Central New England Railway Company First Mortgage, dated January 1, 1911,
22 William Street,
New York, N. Y.

58 *Proof of Mailing and of Publication Directed by Order No. 1 of October 23, 1935.*

(i) Bankers Trust Company,
Trustee under The New England Railroad Company Consolidated Mortgage, dated September 2, 1895,
Dutchess County Railroad Company First Mortgage, dated July 1, 1890,
The New York, New Haven and Hartford Railroad Company First and Refunding Mortgage, dated December 9, 1920,
59 New York, New Haven and Hartford Equipment Trust of 1926,
New York, New Haven and Hartford Equipment Trust of 1927,
16 Wall Street,
New York, N. Y.

(j) John F. Addis, Treasurer, State of Connecticut,
Trustee under Stafford Springs Street Railway Company First Mortgage, dated August 15, 1906,
Boston & New York Air Line Railroad Company First Mortgage, dated August 1, 1905,
New York, Providence & Boston Railroad Company General Mortgage, dated April 1, 1892,
60 Naugatuck Railroad Company First Mortgage, dated April 11, 1904,
Housatonic Railroad Company Consolidated Mortgage, dated November 1, 1887,
New Haven and Northampton Railroad Company Consolidated Mortgage, dated June 1, 1906,
Danbury & Norwalk Railroad Company First Refunding Mortgage, dated June 1, 1905,
Hartford, Connecticut.

(k) New York Trust Company,
Trustee under Worcester and Connecticut Eastern Railway Company First Mortgage, dated October 1, 1902,
100 Broadway,
New York, N. Y.

Proof of Mailing and of Publication Directed by Order No. 1 of October 23, 1935. 61

An affidavit of mailing is hereto attached showing that a copy of said Order, in a sealed wrapper, postage prepaid, addressed to each of the aforesaid mortgage trustees, was deposited in the United States mail at New Haven, Connecticut, on October 24, 1935.

2. That, pursuant to said Order No. 1 of October 23, 1935, the Debtor has given notice of the aforesaid hearing by causing a notice in the form of the notice annexed to said Order, made a part thereof, and marked "Exhibit A," directed to its creditors and stockholders, to be published on October 24, 1935, in The New Haven Journal Courier, a newspaper published in the City of New Haven, State of Connecticut, and on October 25, 1935, in The Hartford Daily Courant, a newspaper published in the City of Hartford, State of Connecticut, in The Boston Herald, a newspaper published in the City of Boston, State of Massachusetts, in The Wall Street Journal, a newspaper published in the City of New York, State of New York, and in The Providence Journal, a newspaper published in the City of Providence, State of Rhode Island: 62 63

Affidavits of publication are hereto attached showing the publication of the said notice in the aforesaid newspapers on the dates stated.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
By W. W. MEYER,
Attorney for Debtor.

Dated: November 4, 1935.

([Affidavits omitted in printing])

64 **Order Appointing Trustees.**

[SAME TITLE]

ORDER NO. 5.

The matter of the appointment of one or more trustees of the Debtor's property, pursuant to the requirements of the amendment of August 27, 1935, to Section 77 of the Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United
65 States," as amended, having come on for hearing on November 6, 1935, and it appearing to the Court that the Debtor has given notice of this hearing as directed in its Order No. 1 of October 23, 1935, and the Court having heard the recommendations of counsel representing the Debtor and certain insurance companies and savings banks as to the personnel of the trustees, and the Court being of the opinion that the appointment of trustees herein should not disturb the continuity of operations by the corporate organization of the Debtor and should be at minimum cost to the Debtor, and that the appointment of three trustees would best serve the interests of all
66 parties in interest, it is ORDERED:

1. That Howard S. Palmer, President of the Debtor, of New Haven, W. M. Daniels, of New Haven, and James Lee Loomis of Granby, both of those later named being persons who within one year prior to the date of this order have not been officers, directors, or employees, of the Debtor, any subsidiary corporation, or any holding company connected therewith, be and they hereby are appointed Trustees of the Debtor's property.

2. That the bond of each of said Trustees be and it hereby is fixed at $50,000.00, conditioned to the effect that he will well and truly perform the duties of a Trustee of the Debtor's property and duly account for any moneys

and properties which may come into his hands, and abide by and perform all things which he shall be directed by the Court to do.

3. That these appointments shall become effective upon ratification thereof by the Interstate Commerce Commission.

4. That said Trustees shall within ten days after such ratification, execute and file with the Clerk of this Court such bonds, with sureties approved by said Clerk, for the benefit of whom it may concern. 68

5. That said Trustees shall have, following said ratification and upon filing such bonds, all the title and shall exercise, subject to the control of this Court and consistently with the provisions of said amendatory Section 77, all of the powers of a trustee appointed pursuant to Section 44 of said Act or any other section of said Act, and, to the extent not inconsistent with said amendatory Section 77, the powers of a receiver in an equity proceeding, and, subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the Debtor. 69

6. That, following said ratification and upon the filing of such bonds, all of the property, real, personal and mixed, of every kind and nature whatsoever, of the Debtor shall by this order be vested in said Howard S. Palmer, W. M. Daniels and said James Lee Loomis, as Trustees of the Debtor's property.

7. That said Trustees shall have, following said ratification and upon filing such bonds, all the rights, privileges, powers and duties heretofore granted to or imposed upon the Debtor pursuant to said Order No. 1 of this Court and all orders supplementary thereto and amendatory thereof, and each and all of the orders heretofore entered in this

proceeding shall with respect to said Trustees and the property of the Debtor, be of like force and effect as though said Trustees were therein specifically named in the place of the Debtor, all of said orders being hereby incorporated in and made a part of this order by reference.

8. That, following said ratification and upon filing such bonds, said Trustees shall by this order have authority and power to designate employees of the Debtor to execute and deliver, in their stead and as their agents, checks,
71 drafts, vouchers, orders, contracts, deeds, leases, easements, and any and all instruments of every kind and nature whatsoever, incidental to the operation of the property of the Debtor, and that such instruments, so executed by the agents of said Trustees, shall bind said Trustees the same as though their signatures had been affixed thereto.

9. That this Court reserves full right and jurisdiction to make, from time to time, such additional orders herein as the Court may deem proper, as well as any orders amending, extending, limiting, modifying, or otherwise
72 changing this order, and in all respects to regulate and control the conduct of said Trustees.

10. That the Clerk of this Court forthwith transmit to the Interstate Commerce Commission, Washington, D. C., a certified copy of this order and a copy of the stenographic minutes of said hearing of November 6, 1935, to the end that said Interstate Commerce Commission may determine upon the ratification of the appointments hereby designated and may, at its convenience, file with this Court its determination thereon.

ENTER:

CARROLL C. HINCKS,
District Judge.

Dated: November 8th, 1935.

73

Petition of Debtor for Order to Provide that in Case of Disaffirmance of Leases Payments do not Constitute Payments Under Terms of Lease.

(Filed November 30, 1935.)

[SAME TITLE]

PETITION FOR ORDER No. 17.

74

Comes now the Debtor and respectfully represents:

(1) That pursuant to the authority granted in paragraph (3), sub-paragraph (b) of Order No. 1, it may be considered advisable for the Debtor to make certain payments stipulated under leases prior to the time when it is decided whether such leases shall be affirmed; that while said sub-paragraph provides that such payments shall not constitute affirmation of such leases or any of them, and while paragraph (4) of such order provides that the performance by the Debtor of a lease within the period or periods allowed for disaffirmance thereof shall not constitute or be evidence of the adoption or assumption of such lease by Debtor or the waiver by it of its right to disaffirm the same, yet neither provision expressly reserves rights in favor of the Debtor with respect to moneys which may be thus paid.

75

(2) That if sums are paid pursuant to the above-mentioned authority and the leases upon which such payments are made are later disaffirmed, it might be contended that the amounts were paid once and for all as rent or in compliance with other covenants in the leases and could not thereafter be recovered, set-off, charged or adjusted re-

gardless of the earnings or operating deficits of the leased properties, and that such a contention might lead to controversy.

WHEREFORE, Debtor prays that an order may be entered amplifying said Order No. 1 to provide that in case payments are made under the authority of said Order No. 1 to comply with any obligations of the Debtor under leases, and any such lease shall be subsequently disaffirmed, the operation of the leased properties shall have
77 been and any payment or payments so made under said lease shall be deemed to have been made for the account of the lessor, and that such payments shall be recovered, set-off or made and charged, on the earnings and/or properties of the lessors prior to any mortgage or other lien thereon, by such method as the Court shall determine.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

By H. S. PALMER,
Its President.

78 H. J. WELLS,
Attorney for Debtor.

(Verification omitted in printing.)

79

Order Providing that in Case of Later Disaffirmance of Leases Payments Made do not Constitute Payments Under Terms of Lease.

[SAME TITLE]

ORDER No. 17.

This cause coming on for further hearing on petition of the Debtor with respect to amending Order No. 1 to provide that in case of subsequent disaffirmance payments 80
made on leases should not be regarded as payments of rental or payments in compliance with other covenants in said leases, and the Court being fully advised in the premises, it is ORDERED:

(1) That in case payments are made pursuant to the authority granted the Debtor in paragraph (3), sub-paragraph (b), of Order No. 1 to comply with the obligations of the Debtor under leases, and such leases shall be subsequently affirmed and adopted by the Debtor, or such Trustees of the property of the Debtor as may hereafter qualify, or pursuant to a plan of reorganization, said pay- 81
ments shall be deemed to have been made on account of the rental due from the Debtor under such leases.

(2) That in case such leases shall be disaffirmed or rejected by the Debtor, or such Trustees of the property of the Debtor as may hereafter qualify, or under a plan of reorganization, the operation of the leased properties shall have been and said payments shall be deemed to have been made for the account of the lessors, and such payments shall be recovered, set-off, or made and charged, on the earnings and/or properties of the lessors prior to

any mortgage or other lien thereon, by such method as the Court shall determine and further reserving all rights and equities of the parties arising from such payments.

(3) That nothing herein contained shall be deemed to affect in any way any right of the Debtor or such Trustees of the property of the Debtor as may hereafter qualify to affirm or disaffirm said leases, or any right which the lessors, their bondholders, stockholders, or any of them, may now or hereafter have to full performance by the
83 Debtor and such Trustees of the property of the Debtor as may hereafter qualify, of all its obligations under said leases, or any rights which they or any of them may now or hereafter have on account of any existing or future failure of the Debtor and such Trustees of the Debtor as may hereafter qualify and/or the successors to the business and the property of the Debtor to comply with the terms of said leases, except to the extent cured (but without prejudice, as aforesaid) by the making of said payments.

ENTER:

84

CARROLL C. HINCKS,
District Judge.

Dated: Nov. 30, 1935.

85

Report of Mailing of Notice of Disaffirmance of Lease dated February 15, 1893, from Old Colony Railroad Company to the New York, New Haven and Hartford Railroad Company.

[SAME TITLE]

Now come Howard S. Palmer, W. M. Daniels and James Lee Loomis, the Trustees of the Debtor's property, by W. W. Meyer, their Counsel, and respectfully report to the Court:

86

That pursuant to authority granted in Orders No. 1 and No. 5 herein said Trustees have given notice to Old Colony Railroad Company of the disaffirmance and rejection of the unexpired lease dated February 15, 1893, from Old Colony Railroad Company to The New York, New Haven and Hartford Railroad Company.

An affidavit of mailing is hereto attached showing that a copy of said notice, in a sealed wrapper, postage prepaid, was sent by United States registered mail on June 1, 1936, to Old Colony Railroad Company at South Station, Boston, Massachusetts.

Said notice is attached to said affidavit of mailing.

87

HOWARD S. PALMER,
W. M. DANIELS,
JAMES LEE LOOMIS,
Trustees.

By
W. W. MEYER,
their Counsel.

Dated: June 2, 1936.
Filed: June 2, 1936.

(Affidavit and notice omitted in printing.)

88

Petition of Old Colony Railroad Company for Reorganization Herein.

(Filed June 13, 1936.)

[SAME TITLE]

PETITION FOR ORDER No. 74.

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT:

89

The petition of Old Colony Railroad Company, a railroad corporation, with principal office at South Station, Boston, Massachusetts, respectfully shows:

1. That the petitioner is a railroad corporation, duly organized in 1872 by a union of Old Colony and Newport Railway Company and Cape Cod Railroad Company under the laws of the Commonwealth of Massachusetts, empowered to own, lease and operate railroads, and is a citizen and resident of said Commonwealth of Massachusetts; that it owns and is lessee of railroads in that
90 Commonwealth and in the State of Rhode Island; that it is not a street, suburban or interurban electric railway; that the lines of railroad owned or leased by the petitioner form an important part of the system of the Debtor herein and carrier operations have been for many years conducted over said lines by the Debtor herein, which owns a majority of the capital stock of the petitioner having power to vote for the election of directors; that the terms and conditions of such operation have been as stipulated in a certain indenture (referred to hereafter as "said lease") from the petitioner to Debtor, a copy of which is attached hereto as Exhibit A.

91

2. That on October 23, 1935, the Debtor filed in this Court its petition in the above entitled proceeding under Sec. 77 of Chapter VIII of the Acts of Congress relating to bankruptcy; that on the same date this Court entered its Order No. 1 approving the Debtor's said petition as properly filed under said Section; and that thereafter this Court appointed Trustees of the property of the Debtor.

3. That since their qualification the Trustees so appointed by this Court have continued to conduct carrier 92
operations over said lines of railroad owned or leased by the petitioner.

4. That certain payments, including rentals, payments of interest on funded and unfunded debt, and payments of taxes, which heretofore became due since October 23, 1935, under said lease were made by the Debtor or said Trustees by authority of this Court; and that Order No. 1 and Order No. 17 herein were by their terms applicable to such payments.

5. That the rental due March 31, 1936, in the amount of 93
$438,858 was not paid by the Debtor or by said Trustees; that upon a petition by said Trustees filed on April 23, after notice and hearing, this Court entered an order April 28 advising said Trustees to withhold said payment until further order; that said payment is now in default and the grace period stipulated in said lease has expired; that the interest in the sum of $139,950 payable by the Debtor or said Trustees under the terms of said lease, on June 1, 1936, upon the petitioner's Series "B" 5% bonds (maturing December 1, 1945) has not been paid.

6. That on June 1, 1936, said Trustees gave formal notice to the petitioner of their disaffirmance of said lease;

that the aforementioned Order No. 1 provided among other things that the Debtor might prior to April 23, 1936, disaffirm any of its existing leases and that the performance by the Debtor of any lease within such period allowed for the disaffirmance thereof should not constitute or be evidence of the adoption or assumption by the Debtor of any such lease or the waiver by it of its right to disaffirm the same; that by Order No. 56 herein the time within which any such disaffirmance might be made was extended
95 to October 23, 1936; that Order No. 17 herein contains provisions that in case any lease should be disaffirmed or rejected by the Debtor or the Trustees of the Debtor, the operation of the leased property and any payments made [pursuant to the provisions of Order No. 1 paragraph (3) (b) herein] to comply with obligations of the Debtor under any such lease "shall be deemed to have been made for the account of the lessors and such payments shall be recovered, set off and made and charged on the earnings and/or properties of the lessors prior to any mortgage or other lien thereon, by such method as the Court shall determine."

96 7. That the petitioner is now compelled to assume all the risks of operation of its lines of railroad and is a railroad corporation as defined in Section 77 of Chapter VIII of the acts of Congress relating to bankruptcy.

8. That the petitioner is entitled under the provisions of said lease to re-enter upon the demised premises and the same have and possess as of its former estate without prejudice to its right of action for arrears of rent or breach of covenant, but that the petitioner has no funds, no equipment and no organization which would enable it to resume operation on a separate basis; that said re-entry is now impracticable and contrary to the public interest

and would entail irreparable loss and damage to the petitioner and its security holders; that the petitioner could at best only accomplish a technical resumption of separate operation by agreement with said Trustees; that the petitioner's lines of railroad are already being operated by said Trustees pursuant to the orders of this Court; that said lines and those of the Debtor are now operated as integral parts of one railway system, and the problems of operation and administration of the property of the Debtor and that of the petitioner are now so closely inter- 98
related that the interests of the petitioner and its security holders will be best conserved by the continuance of unified operation by said Trustees under the supervision of this Court pending the reorganization of the Debtor or the further order of this Court; that the petitioner approves and agrees to such operation of its property by said Trustees for the petitioner's account until further notice.

9. That on June 1, 1936, there became due interest in the amount of $139,950 on the 5% First Mortgage Gold Bonds Series "B" of the petitioner and on July 1, 1936, there will become due interest in the total amount of 99
$108,125 upon two other issues of bonds of the petitioner [viz. the 4½% First Mortgage Gold Bonds, Series "C" and the 4% Bonds due January 1, 1938]; that on June 15 there will be due $61,628.90 quarterly installment of federal income taxes of the petitioner; that on June 15 there will mature bank loans of the petitioner in the aggregate amount of $1,000,000 and on June 23 there will mature an additional bank loan of the petitioner in the amount of $400,000; that on June 30 or July 1 there will become due $100,000 and on July 1 $54,250 on account of rentals or interest, due under a lease dated April 7, 1888, from the Boston and Providence Railroad Corporation to the peti-

tioner; that on August 1 there will become due interest in the amount of $96,250 upon the 5½% First Mortgage Gold Bonds Series "A" of the petitioner, and that other obligations of the petitioner in substantial amounts will fall due from time to time during the remainder of the year 1936, that the petitioner is without funds to meet and discharge the aforesaid obligations, and, on information and belief alleges that it has no means of borrowing or otherwise procuring said funds and that it is unable to meet its debts as they mature.

10. That the petitioner desires to effect a reorganization in connection with or as a part of the plan of reorganization of the Debtor herein.

11. That a copy of this petition is this day being filed with the Interstate Commerce Commission.

12. That the filing of this petition was duly authorized by resolution of the Board of Directors of the petitioner adopted at a meeting thereof duly held June 2, 1936.

WHEREFORE, your petitioner prays

(1) That an order may be entered approving this petition as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, that the Court take and exercise its jurisdiction over the property and affairs of the petitioner and make such orders and enter such judgments and decrees from time to time as may be proper, necessary or incidental to the reorganization of the property, debt and corporate structure of the petitioner and that it may be allowed to effect a plan of reorganization in connection with or as a part of the plan of reorganization of the Debtor herein, and that it be granted all other and further relief to which it may be entitled.

2. That the Trustees of the property of the Debtor herein be authorized and directed to continue until further order to operate the petitioner's property for the account of the petitioner, and to preserve such basic information and keep such records and accounts in addition to the accounts prescribed by the Interstate Commerce Commission as will permit of such a segregation and allocation as the necessities of the case may require of the earnings and expenses between said property and the remaining property under the administration of the Trustees. 104

OLD COLONY RAILROAD COMPANY,
By ARTHUR P. RUSSELL,
President.

Dated: June 2, 1936.

THE COMMONWEALTH OF MASSACHUSETTS, }
COUNTY OF SUFFOLK, } ss.:

ARTHUR P. RUSSELL, President of Old Colony Railroad Company, being first duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief. 105

ARTHUR P. RUSSELL.

Subscribed and sworn to before me
this second day of June, 1936.

RICHARD AMMI CUTTER,
Notary Public.
My Commission Expires January 26, 1940.

(Notarial Seal)

106 *Petition of Old Colony Railroad Company for Reorganization Herein.*

Exhibit A.

Lease

By the

Old Colony Railroad Company

to

The New York, New Haven & Hartford
107 ### Railroad Company

for term of

Ninety-nine Years from March 1, 1893

dated

February 15, 1893

The Old Colony Railroad Company (hereinafter called the lessor), hereby demises and lets, for the term of ninety-nine years beginning the first day of March, 1893, unto
108 The New York, New Haven and Hartford Railroad Company (hereinafter called the lessee), and to its successors and assigns, both the lessor and lessee being corporations existing under the laws of the Commonwealth of Massachusetts and whose roads connect with each other, all and singular its railroads and property of every description, whether within its location or not, including all rights, franchises, easements, privileges and appurtenances thereunto belonging, together with the right to demand and receive for the lessee's own use all tolls, rents, revenues, income and profits of the demised premises, including also therein all the right, title and interest of the lessor in and to any and all railroads operated by it, under

lease or otherwise, and in or to any stock and securities of other corporations owned by it, or held by it, or for it, all dividends thereon, and the right of voting on the same, and in and to all contracts and obligations of or with other railroads, corporations or individuals, and all income advantages and benefits to be derived therefrom, hereby assigning and transferring unto the lessee, under the terms and provisions of this lease, and for the purposes thereof, and subject to all obligations and incumbrances thereon, all its railroad, property, franchises and assets 110
of every description, however described and wherever situated, except the corporate seal, the stockholders' and directors' record books, and the transfer and stock books, to which the lessee may have access at reasonable times.

And the lessor covenants with the lessee that it will suffer and permit the lessee, it keeping all the covenants on its part as herein contained, to occupy, possess and enjoy said premises, property, rights, franchises and privileges during the term aforesaid without hindrance or molestation.

And the lessor hereby makes, constitutes and appoints the lessee its agent during the term of this lease to operate 111
all its leased railroads and property, the lessee herein to do and perform as such agent all acts with reference thereto incumbent by law or by contract upon the lessor herein and in consideration thereof to receive the income and profit arising from such operation; and the lessor hereby agrees, as soon as it legally may, to make from time to time proper and complete assignments to the lessee of all leasehold rights of the lessor.

And the lessor covenants that during the continuance of this lease it will maintain its corporate organization, the lessee paying all reasonable and proper expenses thereof, and, for that purpose will hold all necessary meet-

ings, elect all necessary officers and make all necessary records, reports, reissues of stock certificates, and transfers and registrations of bonds; and that it will, from time to time, whenever requested by the lessee, take real estate for the convenient operation of said railroads, the lessee, however, advancing therefor all damages and expenses; and that the lessee may use the lessor's name in bringing or defending any suits or proceedings so far as it is or may be necessary for the protection or enjoyment of said demised premises, property, rights, franchises and privileges, or for the acquisition of additional real estate, but at the sole expense of the lessee, saving the lessor harmless from all loss, costs or damages thereby accruing.

113

And the lessor covenants that, for the purpose of making permanent improvements upon the property hereby demised and for the purpose of discharging its indebtedness, it will at the request of the lessee make such lawful issue, and reissue in renewal, of bonds or of stock, or both, as shall from time to time be necessary and proper to be issued; and that at the request of the lessee it will execute mortgages of said demised premises or any part thereof to secure the payment of the principal and interest of such bonds; and that it will not issue any stock or bonds, or create any indebtedness or lien upon said demised premises, or property, except under and in accordance with the directions, or by the previous written consent of the lessee.

114

And the lessor hereby makes, constitutes and appoints the lessee its true and sufficient and lawful attorney from time to time, to bargain and sell, with the assent of the directors of the lessor, lands and structures of the lessor on such terms as to the lessee shall seem meet, and hereby authorizes the lessee in the name of the lessor to make, execute, acknowledge and deliver good and sufficient deeds and conveyances of all the right, title and interest

of the lessor so bargained and sold in and to the same; the lessor agreeing, whenever thereto requested by the lessee, and upon reasonable notice, to affix its corporate seal to such deeds and conveyances; and the lessee covenants and agrees that other lands and structures of equal value shall be conveyed to the lessor in lieu of any lands or structures so sold and conveyed, and that if the lessee shall under any power herein conferred, sell or abandon the lands and structures now constituting the terminals leased to the lessor in the city of Providence, the lessee shall acquire, 116
construct and convey to the lessor of the lessor herein new terminals of equal value and sufficient for its business, and to be such as will conform to the agreements of the lease of the Boston and Providence Railroad Corporation to the lessor; all property so acquired to become a part of the demised premises.

And the lessor covenants that it will at any time or times hereafter upon the reasonable request of the lessee, make, do, and execute, or cause, or procure to be made, done and executed all and every such further and other lawful and reasonable acts, conveyances, transfers, assignments and assurances in the law, for the better and more effectually 117
vesting and confirming the premises and property hereby leased, or intended so to be, in and to the lessee, as by the lessee shall be reasonably devised, advised or required.

And the lessee covenants to pay as rent hereunder on the 30th day of June, 1893, a sum equal to a dividend of two dollars and thirty-three and one-third cents upon each share of the capital stock of the lessor then outstanding; and thereafter, except as hereinafter provided, sums equal to dividends at the rate of seven per cent per annum, payable quarterly, upon said capital stock then from time to time outstanding.

And the lessee further covenants that as soon as it lawfully may, it will prior to January first, 1900, issue in the

proportion of nine shares of its capital stock in exchange for ten shares of the capital stock of the lessor, then outstanding, and will give notice thereof by mail to each stockholder of the lessor and thereafter, and until six months after said exchange shall be offered to the stockholders of the lessor, upon the assignment to the lessee of ten shares of the capital stock of the lessor or any multiple thereof, and the surrender of the certificate or certificates therefor, the lessee will, whenever its stock transfer books
119 are open, issue to the owner of said shares in exchange therefor, a certificate for the proportionate number as above provided, of shares of the capital stock of the lessee.

And the lessee covenants that in case it shall be unable to perform the covenants contained in the preceding paragraph prior to the first day of July, 1893, it will thereafter, and between said first day of July, and six months after the date when it shall be able to perform said covenants, pay (in lieu of said sums equal to dividends at the rate of seven per cent per annum) a sum on each share of the outstanding capital stock from time to time of the lessor equal to nine-tenths of such dividends as the lessee shall pay
120 upon each share of its own capital stock and will secure to the stockholders of the lessor the same proportion of such pecuniary privileges as the lessee shall give upon each share of its own capital stock.

And the lessee further covenants to provide for the payment in the manner hereinbefore mentioned, of the principal of all funded indebtedness for the payment of which the lessor may be legally holden as the same shall from time to time mature, and to assume and pay all the other obligations of the lessor of every name and nature as the same shall from time to time fall due, and to keep and perform all and singular the contracts relating to said demised premises and property now in force and binding on the lessor, whether arising under leases or otherwise,

and as to property leased to the lessor, the lessee shall be subject to the leases under which such property is held.

And the lessee further covenants to pay, during each year of said term, all taxes, rates, charges and assessments, ordinary and extraordinary, which may be lawfully imposed or assessed in any way upon the lessor or lessee with reference to the premises and property hereby demised, the capital stock of the lessor, its indebtedness, franchises and revenues or said rental; said payments to be made to the authority or treasurer entitled by law to 122
receive the same, whether Federal, State or municipal, so that said lessor shall be saved harmless, during the continuance of this lease from any tax, assessment or charge under laws or proceedings made or authorized by the United States or any State or municipality.

Provided, that (1) if the lessee shall at any time fail to pay the interest on the lessor's bonded indebtedness when the same falls due, or (2) if the lessee shall fail for thirty days to make any quarterly payment of rent as above stipulated, or (3) if the lessee shall fail to keep or perform any other of its covenants or agreements in this lease contained, and such default shall continue for six months 123
after written notice thereof shall have been given by the lessor to the lessee; then, and in either of said events, this lease shall expire and terminate, at the option of the lessor, and the lessor may thereupon re-enter upon the demised premises, and the same have and possess as of its former estate without prejudice to its right of action for arrears of rent or breach of covenant.

And the lessee covenants that it will at its own cost and expense during the continuance of this lease, furnish and provide all such books, forms and papers, and do and perform all such acts and things as may be required for the proper distribution of dividends, payment of interest and for the issue, record and transfer of the stock of the lessor,

and for the issue, registration and transfer of any bonds herein referred to, as a part of the expenses of organization.

And the lessee covenants that it will operate the lessor's said railroads and the leased railroads of the lessor as required by all legal enactments from time to time in force, and furnish all equipment, in addition to that hereby demised, which may be necessary for such operation, and maintain said demised premises and property during said
125 term in good condition and up to its present standard as a railroad; and that it will make all additions, alterations, improvements and betterments which may be necessary or proper with reference to the premises and property hereby leased; and that all lands, structures, improvements, betterments and renewals so added to or made upon the real estate hereby demised shall become the property of the lessor, and a part of the demised premises; and that at the expiration of this lease, whether by lapse of time or otherwise, it will deliver to the lessor possession of said demised premises, and leased properties, rights, franchises and privileges, together with any and all additions and sub-
126 stitutions which may have been made thereto as aforesaid, and will also return or deliver, in lieu of the personal property set out in the inventory hereinafter provided to be made, the same or other personal property of similar character, value and uses, and appropriate for the operation of the lessor's railroads.

And the lessee covenants that it will save the lessor harmless from all suits, costs, damages and expenses by reason of any act or omission of the lessee in the use of said demised premises, under this lease; and will, at its own expense, defend all suits pending or brought against the lessor and pay the judgments therein when demanded on final process; and that it will during said term make all returns required by the laws of any State, or of the United

States, in relation to the property hereby leased, to any public officer, or other legal authority; and that, should any returns be required by law of the lessor the lessee will furnish, on demand, so far as it has the means, all information necessary therefor.

And the parties hereto mutually agree that an inventory and appraisal of all the personal property hereby demised, including stocks and securities held by the lessor, shall be made as of the first day of March, 1893, by representatives of the lessor and lessee, or in case of disagreement as to 128
any item or items by a third person to be agreed upon by the lessor and lessee.

Nothing herein contained shall prevent the lessor and lessee from modifying, changing, amending, annulling or cancelling this lease by mutual agreement.

It is understood that this lease is made subject to approval by the stockholders of said parties respectively as required by law.

In Witness Whereof, the parties hereto, under the authority and direction of their respective Board of Directors have caused this instrument 129
to be signed by their respective Presidents and their corporate seals to be hereto affixed, this fifteenth day of February, A. D. 1893.

[L. S.]

Old Colony Railroad Company,
Charles F. Choate, President.

[L. S.]

The New York, New Haven and Hartford Railroad Company,
By Charles P. Clark, President.

Witness:—E. G. Parker,
J. G. Parker.

130 *Order Approving Petition of Old Colony Railroad Company for Reorganization Herein.*

COMMONWEALTH OF MASSACHUSETTS, }
COUNTY OF SUFFOLK, } ss.:

Boston, February 15, 1893.

Then personally appeared before me Charles F. Choate President of the Old Colony Railroad Company and Charles P. Clark President of The New York, New Haven and Hartford Railroad Company and severally acknowledged the foregoing instrument executed by them for and
131 in behalf of said companies and under authority granted to them by vote of the directors of said companies, to be the free act and deed of said Old Colony Railroad Company and said New York, New Haven and Hartford Railroad Company.

[L. S.]

AUSTIN W. ADAMS,
Notary Public.

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132 **Order Approving Petition of Old Colony Railroad Company for Reorganization Herein.**

[SAME TITLE]

ORDER No. 74.

Upon due consideration of the petition of Old Colony Railroad Company, verified June 2, 1936, and filed June 3, 1936, alleging among other things that it is a railroad corporation organized and existing under the laws of the

Commonwealth of Massachusetts, owning and leasing railroads in that Commonwealth and in the State of Rhode Island, that the Debtor herein owns a majority of the capital stock of the petitioner having power to vote for the election of directors; that the Trustees herein have continued since their qualification to conduct carrier operations over said lines of railroad owned or leased by the petitioner; that such operations have been carried on pursuant to Orders No. 1 and No. 17 herein and are now carried on for the account of the petitioner; that the petitioner approves and agrees to the continued operation by said Trustees for its account; that the petitioner is confronted with current obligations in substantial amounts; that it is unable to meet its debts as they mature, and that the petitioner desires to effect a plan of reorganization in connection with or as a part of the plan of reorganization of the Debtor herein, and the Court being satisfied that said petition complies with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy as amended, and has been filed in good faith, it is ORDERED:

1. That said petition be and it hereby is approved as properly filed under such Section 77.

2. That until further order the Trustees of the property of the Debtor continue to possess and to operate the petitioner's property, such operation to be for the account of the petitioner with all the powers, rights, privileges, duties and obligations with respect to said property as have been heretofore granted to and imposed upon or required of them with respect to the property of the Debtor pursuant to any and all of the orders heretofore entered by this Court in this proceeding, and to preserve such basic information and keep such records and accounts in addition

to the accounts prescribed by the Interstate Commerce Commission as will permit of such a segregation and allocation as the necessities of the case may require between the petitioner's property and the remaining property under the administration of the Trustees.

3. That within sixty days after the entry of this order the petitioner shall file with the Clerk of this Court a statement of the assets and liabilities of petitioner as of
137 the close of business on May 31, 1936.

4. That all persons, firms and corporations whatsoever, and wheresoever situated, located or domiciled, be and they hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties, or premises belonging to, or in the possession of the petitioner, or from taking possession of, or in any way interfering with the same, or
138 any part thereof, or from interfering in any manner with the operation of its railroad or properties or the carrying on of its business under the orders of this Court, or from commencing or continuing any suits against the petitioner; provided, that suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction.

5. That all persons and corporations holding collateral, including deposit balances or credits, heretofore pledged by the petitioner as security for its notes or obligations be and each of them hereby is restrained and enjoined

from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, until further order of this Court.

6. That the petitioner hereby is directed to give notice by mailing a copy of this order to its mortgage trustee and to cause a notice directed to its creditors and stockholders to be published within five days from the date of entry of this order once in The New Haven Journal Courier, a newspaper published in the City of New Haven, Connect- 140
icut, and in the Boston Herald, a newspaper published in the City of Boston, Massachusetts, and in the Providence Journal, a newspaper published in the City of Providence, Rhode Island, of a hearing to be held on June 18, 1936, at 2 D. S. T. o'clock in the Court Room occupied by this Court in the United States Court House, New Haven, Connecticut, at which hearing, or any adjournment thereof, the Court will appoint the present Trustees of the Debtor or some other suitable person or persons as Trustees of the property of the petitioner. The notice of such hearing shall be substantially in the form of the notice annexed hereto marked "Exhibit A". When such mailing and pub- 141
lication has been completed the petitioner shall file with the Clerk of this Court its report with respect thereto.

ENTER:

CARROLL C. HINCKS,
District Judge.

Dated June 3, 1936.

142 *Order Approving Petition of Old Colony Railroad Company for Reorganization Herein.*

EXHIBIT "A".

NOTICE TO ALL CREDITORS AND STOCKHOLDERS
OF
OLD COLONY RAILROAD COMPANY

Pursuant to an order entered June 3, 1936, by the Honorable Carroll C. Hincks, Judge of the District Court of the United States for the District of Connecticut, notice
143 is hereby given that a hearing will be held on June 18, 1936, at 2 o'clock P. M., D. S. T., by said Judge, in the courtroom usually occupied by him in the United States Court House, New Haven, Connecticut, at which hearing the Court will, pursuant to the provisions of Section 77 of the Act entitled: "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and acts amendatory thereof and supplementary thereto, appoint the trustees of the property of The New York, New Haven and Hartford Railroad Company, or some other suitable person or persons, as trustees of Old Colony Railroad Company.

144 OLD COLONY RAILROAD COMPANY.

Dated at Boston, Massachusetts,
June 3, 1936.

Proof of Mailing and of Publication Directed by Order No. 74 of June 3, 1936. 145

(Filed June 17, 1936.)

[SAME TITLE]

And now comes Old Colony Railroad Company and respectfully reports to this Honorable Court:

1. That pursuant to the order of this Court entered on June 3, 1936, Old Colony Railroad Company has given notice of a hearing to be held by the Court on June 18, 1936, at 2:00 o'clock in the afternoon, Daylight Saving Time, in its Court Room in the United States Court House, New Haven, Connecticut, for the appointment by the Court at such hearing or any adjournment thereof of the Trustees of The New York, New Haven and Hartford Railroad Company, Debtor, or some other suitable person or persons as trustees of Old Colony Railroad Company, by mailing, postage prepaid, registered mail, a copy of said order to the mortgage trustee of Old Colony Railroad Company and to the holders of certain of its other obligations as follows: 146 147

(a) Old Colony Trust Company, Trustee under first mortgage dated January 30, 1924, securing First Mortgage Gold Bonds of Old Colony Railroad Company, 17 Court Street, Boston, Massachusetts,

(b) The National Shawmut Bank of Boston, 40 Water Street, Boston, Massachusetts, holder of a secured collateral note of Old Colony Railroad Company,

148 *Proof of Mailing and of Publication Directed by Order No. 74 of June 3, 1936.*

(c) The First National Bank of Boston, 1 Federal Street, Boston, Massachusetts, holder of a secured collateral note of Old Colony Railroad Company,

(d) The Chase National Bank of New York, 18 Pine Street, New York City, New York, holder of a secured collateral note of Old Colony Railroad Company.

149 2. That, pursuant to said order No. 74 dated June 3, 1936, Old Colony Railroad Company has given notice of the aforesaid hearing by causing a notice in the form of the notice annexed to said order, made a part thereof and marked Exhibit A, directed to its creditors and stockholders, to be published on June 5, 1936, in The New Haven Journal Courier, a newspaper published in New Haven, Connecticut; in The Boston Herald, a newspaper published in Boston, Massachusetts, and in The Providence Journal, a newspaper published in Providence, Rhode Island.

150 OLD COLONY RAILROAD COMPANY
By R. AMMI CUTTER
Of counsel for said company

Dated June 6, 1936.

(Affidavits of mailing and publication omitted in printing.)

151

Order Appointing Trustees of Old Colony Railroad Company.

[SAME TITLE]

ORDER No. 75.

The matter of the appointment of one or more trustees of the property of Old Colony Railroad Company, pursuant to the requirement of the amendment of August 27, 1935, to Section 77 of the Act of July 1, 1898, entitled "An 152
Act to Establish a Uniform System of Bankruptcy throughout the United States", as amended, having come on for hearing on June 18, 1936, and it appearing to the Court that Old Colony Railroad Company has given notice of this hearing as directed in the Court Order No. 74 of June 3, 1936, and the Court having heard the recommendations of counsel representing various parties in interest as to the personnel of the trustees, and the Court being of the opinion that the appointment of trustees herein should not disturb the continuity of operations of the railroad system of The New York, New Haven and Hartford Railroad Company as at present carried on by 153
the trustees of that corporation and that the appointment of the Trustees of The New York, New Haven and Hartford Railroad Company would best serve the interests of all parties in interest, it is ORDERED:

1. That Howard S. Palmer of New Haven, Connecticut, W. M. Daniels of New Haven, Connecticut, and James Lee Loomis of Granby, Connecticut, all being the Trustees of the property of The New York, New Haven and Hartford Railroad Company appointed by this Court, and each of those later named being a person who within

one year prior to the date of this Order has not been an officer, director, or employee of Old Colony Railroad Company, any subsidiary corporation, or any holding company connected therewith, be and they hereby are appointed Trustees of the property of Old Colony Railroad Company.

2. That the bond of each such Trustee be and it hereby is fixed at $10,000.00 conditioned to the effect that he will
155 well and truly perform the duties of Trustee of the property of Old Colony Railroad Company and duly account for any money and property which may come into his hands and abide by and perform all things which he shall be directed by the Court to do.

3. That this appointment shall become effective upon ratification thereof by the Interstate Commerce Commission.

4. That said Trustees shall within ten days after such ratification, execute and file with the Clerk of this Court
156 such bonds, with sureties approved by said Clerk, for the benefit of whom it may concern.

5. That said Trustees shall have, following the qualification of each of them by said ratification and by filing such bonds, all the title and shall exercise, subject to the control of this Court and consistently with the provisions of said Section 77, as amended, all the powers of trustees appointed pursuant to Section 44 of said Act or any other section of said Act, and, to the extent not inconsistent with said Section 77, as amended, the powers of receivers in an equity proceeding and, subject to the control of this Court and the jurisdiction of the Interstate Commerce

Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of Old Colony Railroad Company, and further, that upon the qualification of said Trustees in the manner aforesaid, title to all of the property, real, personal and mixed, of every kind and nature whatsoever, of Old Colony Railroad Company shall by this order be vested in said Howard S. Palmer, W. M. Daniels and James Lee Loomis as Trustees of the property of Old Colony Railroad Company. 158

6. That, inasmuch as the public interest and the interests of Old Colony Railroad Company and of The New York, New Haven and Hartford Railroad Company require that, until the further order of the Court, the railroad lines and property of Old Colony Railroad Company be operated as an integral part of the system of railroads now being administered by the Trustees of The New York, New Haven and Hartford Railroad Company, said Trustees of The New York, New Haven and Hartford Railroad Company, as such, be and they hereby are directed to continue to possess and operate the properties 159 of Old Colony Railroad Company, such operation to be for the account of Old Colony Railroad Company or the Trustees of its property. In connection with such operation (but subject to their obligation to account to Old Colony Railroad Company or to themselves as the Trustees of its property) said Trustees shall have the following powers:—

(1) The power and authority to operate, maintain and repair the railroad and properties of Old Colony Railroad Company, to manage its railroad business and to carry on the same through the officers, em-

ployees, and agents of the said Trustees of The New York, New Haven and Hartford Railroad Company; to collect the accounts, revenues, income, rents, profits, and tolls accrued from its railroads and properties, and to the extent necessary to protect, preserve, and benefit its railroad or properties or business, to make and pay for additions thereto and betterments thereof.

(2) The power and authority from time to time
161 until further order of this court to pay:

(a) all taxes and assessments due or to become due upon the properties, income, franchises, or business of Old Colony Railroad Company,

(b) all necessary current expenses of every description in operating the railroads and property, preserving the assets and conducting the business of Old Colony Railroad Company, including without limitation expenses of the various classifications enumerated in paragraph (3) subsections (b) (c)
162 and (d) of Order No. 1 herein, so far as such expenses may be determined to be properly allocable to the property of Old Colony Railroad Company.

(c) Such sums as may be necessary to comply with the obligations of every description of Old Colony Railroad Company under contracts or leases, but such payments shall not constitute affirmation of such contracts or leases or any of them.

(d) such sums as may be necessary to maintain the corporate existence of Old Colony Railroad Company, including corporate franchise, stamp and similar taxes, the necessary expense of keeping and

preserving corporate records, of maintaining transfer offices and agents, of registering and transferring its securities, and, to the extent of the liability of Old Colony Railroad Company therefore, of paying the proper charges and expenses of the trustee or trustees under any indenture or mortgage pursuant to which securities of Old Colony Railroad Company have been issued.

The Trustees of The New York, New Haven and Hartford Railroad Company are expressly authorized, in connection with their operation of the said railroad lines and property of Old Colony Railroad Company as a part of the system of lines and properties heretofore operated by them, to mingle the funds, income, assets, equipment and other properties of Old Colony Railroad Company with the other property subject to their control and, except as otherwise expressly ordered by the Court and pending its further order, for the purposes of operation only, to deal with all the properties subject to their control as a single railroad system, but such Trustees shall preserve (and shall make reasonably available to Old Colony Railroad Company) all such basic information, particularly with respect to the operation of the property of Old Colony Railroad Company and to the railroad system, as a whole, now operated by said Trustees, and keep such records and accounts with respect thereto, in addition to the accounts prescribed by the Interstate Commerce Commission, as will permit of such a segregation and allocation under the direction of the Court, as the necessities of the case may from time to time require, between the property of Old Colony Railroad Company and the remaining property under the administration of the Trustees, including without limitation a segregation

164

165

and allocation of revenues, income, expenses, property and equipment. In connection with the operation of the railroads and properties of Old Colony Railroad Company, and without limitation of any authority granted to them by this order, the Trustees of The New York, New Haven and Hartford Railroad Company are hereby expressly confirmed in the authority granted to them by Orders Nos. 24, 27, 39 and 49 in these proceedings so far as said orders may be applicable to the property of Old
167 Colony Railroad Company.

7. That, without limitation of any powers, authority, or direction herein given to the Trustees of The New York, New Haven and Hartford Railroad Company, they are hereby specifically directed

(a) to pay on June 30, 1936, for the account of Old Colony Railroad Company, or of the Trustees of its property, the rent in the sum of one hundred thousand dollars ($100,000) payable on July 1, 1936, under the terms of a certain lease from Boston and Providence
168 Railroad Corporation to Old Colony Railroad Company, dated April 7, 1888, and also on July 1, 1936, the sum of fifty-four thousand, two hundred and fifty dollars ($54,250), the interest then falling due under the provisions of said lease dated April 7, 1888, upon the 5% Debentures (maturing July 1, 1938) of Boston and Providence Railroad Corporation.

(b) to pay for the account of Old Colony Railroad Company forthwith, if the same has not been paid, the quarterly installment of federal income taxes of Old Colony Railroad Company due June 15, 1936, in the sum of sixty-one thousand six hundred and twenty-eight dollars and ninety cents ($61,628.90),

and the Trustees of The New York, New Haven and Hartford Railroad Company, either as such or as Trustees of Old Colony Railroad Company, shall not intentionally permit or make any default in the performance of the terms of any lease or executory contract to which Old Colony Railroad Company is a party, or in making all payments due in accordance with any such lease or executory contract, unless and except upon the advice of and with the consent of this Court previously obtained upon petition and after hearing, notice of which hearing 170 shall have been given to all interested parties (as the Court may direct) more than twenty days prior to such hearing.

8. That, following said ratification and upon filing such bonds the said Trustees as Trustees of Old Colony Railroad Company shall by this order have authority and power to designate employees of Old Colony Railroad Company or of The New York, New Haven and Hartford Railroad Company to execute and deliver in their stead and as their agents checks, drafts, vouchers, orders, contracts and any or all instruments incidental to their duties or to the operation of the property of Old Colony Rail- 171 road Company, and that such instruments, so executed by the agents of said Trustees shall bind said Trustees to the same extent as though their signatures respectively had been affixed thereto.

9. That the Trustees of Old Colony Railroad Company in their discretion, but only with the advice and consent of this Court previously obtained upon petition and after hearing notice of which shall have been given to all interested parties (as the Court may direct) more than twenty days prior thereto, at any time prior to November 15, 1936, or prior to such other day as may be provided by

further order of this Court, may disaffirm any of the existing contracts or leases of Old Colony Railroad Company. Such disaffirmance of any such contract or lease shall be effective when notice of such disaffirmance, together with proof of service or mailing of a copy or copies thereof by registered mail to the other party or parties to such lease or contract shall be filed of record in this proceeding. The performance by Old Colony Railroad Company, or by the Trustees of its property, or by the
173 Trustees of The New York, New Haven and Hartford Railroad Company for the account of Old Colony Railroad Company, of any such contract or lease within said period or further periods allowed for disaffirmance thereof shall not constitute or be evidence of the adoption or acceptance of such contract or lease by Old Colony Railroad Company or by the Trustee of its property or the waiver by it or him of its or his right to disaffirm the same. In case payments are made pursuant to the authority granted to Old Colony Railroad Company or the Trustees of its property by the terms of this order, or by the terms of any other order in these proceedings, to com-
174 ply with the obligations of Old Colony Railroad Company under leases or executory contracts and such leases or executory contracts shall be subsequently affirmed and adopted by Old Colony Railroad Company or by the Trustees of its property, or pursuant to a plan of reorganization, said payments shall be deemed to have been made on account of the rental or other payments due from Old Colony Railroad Company under such leases or executory contracts as the case may be. In case such leases shall be disaffirmed or rejected by Old Colony Railroad Company or by the Trustees of its property, or under a plan of reorganization, the operation of the leased properties shall have been and said payments shall be deemed

to have been made for the account of the lessor, and such payment shall be recovered, set-off, or made and charged, on the earnings and properties of the lessor, prior to any mortgage or other lien thereon by such method as the Court shall determine, and further reserving all rights and equities of the parties arising from such payments. In case any such executory contract shall be disaffirmed or rejected by Old Colony Railroad Company or by the Trustees of its property or under a plan of reorganization any payment made under any such executory contract or 176 services performed thereunder shall be the basis of such recovery, set-off, or charge against the other contracting party or parties as the Court shall determine to be proper under all the circumstances.

10. That this Court reserves full right and jurisdiction to make, from time to time, such additional orders herein as the Court may deem proper, as well as any orders amending, extending, limiting, modifying, or otherwise changing this order, and in all respects to regulate and control the conduct of said Trustees.

11. That the Clerk of this Court forthwith transmit to 177 the Interstate Commerce Commission, Washington, D. C., a certified copy of this order and a copy of the stenographic minutes of said hearing of June 18, 1936, to the end that said Interstate Commerce Commission may determine upon the ratification of the appointments hereby designated and may, at its convenience, file with this Court its determination thereon.

ENTER:

CARROLL C. HINCKS,
District Judge.

Dated:
June 18th, 1936.

178 **Order Appointing an Additional Trustee of the Property of the Principal Debtor, Old Colony Railroad Company, and Hartford and Connecticut Western Railroad Company.**

[SAME TITLE]

ORDER No. 149.

The matter of the appointment of a trustee of the prop-
179 erties of The New York, New Haven and Hartford Railroad Company, Principal Debtor herein, of Old Colony Railroad Company and of Hartford and Connecticut Western Railroad Company to succeed W. M. Daniels having come on for hearing on March 9, 1937, and it appearing to the Court that due notice of such hearing was given as provided in Order No. 141 herein, and the Court having heard the recommendations of various parties at interest or their counsel and, being fully advised in the premises, it is ORDERED:

1. That Henry B. Sawyer of Boston, Mass., be and he
180 hereby is appointed as one of the three Trustees of the property of the Principal Debtor, of Old Colony Railroad Company and of Hartford and Connecticut Western Railroad Company to succeed W. M. Daniels who was relieved of further duty by Order No. 140 herein dated February 24, 1937.

2. That the bond of such Trustee be and it hereby is fixed in the aggregate amount of $61,000 conditioned to the effect that he will well and truly perform the duties of a Trustee of said properties and duly account for any money and property which may come into his hands and

abide by and perform all things which he shall be directed by the Court to do.

3. That this appointment shall become effective upon ratification thereof by the Interstate Commerce Commission.

4. That said Trustee shall within ten days after receiving notice of such ratification, execute and file with the Clerk of this Court such bond, with surety approved by the Court, for the benefit of whom it may concern. 182

5. That said Trustees shall have, following his qualification by said ratification and by filing such bond, all the title and powers heretofore vested by orders entered herein and by statute in W. M. Daniels as his predecessor Trustee of said properties.

6. That the Clerk of this Court promptly transmit to the Interstate Commerce Commission, Washington, D. C., a certified copy of this order, to the end that said Interstate Commerce Commission may determine upon the ratification of the appointment hereby made and may, at its convenience, file with this Court its determination thereon. 183

ENTER:

CARROLL C. HINCKS,
District Judge.

Dated: March 10th, 1937.

184 **Petition of Boston and Providence Railroad Corporation for Leave to Intervene.**

(Filed May 26, 1937.)

[SAME TITLE]

PETITION FOR ORDER No. 179.

The petition of Boston and Providence Railroad Corporation respectfully shows:

185 1. Boston and Providence Railroad Corporation, Petitioner herein, is a railroad corporation organized under authority of Chapter 56 of the Special Acts of 1831 of the Massachusetts Legislature, and is authorized thereby to own and operate a railroad. The principal assets of your Petitioner consist of property and equipment constituting a railroad between Boston, Massachusetts and Providence, Rhode Island, and certain branch lines, which said railroad constitutes a part of the so called "New Haven System" by virtue of certain leases hereinafter more fully set forth.

The capital of the Petitioner is represented by 40,000
186 $100 par value shares of stock, of which 39,960 shares are outstanding, and 40 shares are held in the Petitioner's treasury. The funded debt of the Petitioner consists of $2,170,000 5% debenture bonds dated July 2, 1923, and maturing July 1, 1938.

2. By an indenture dated April 7, 1888, to which Old Colony Railroad Company, now in reorganization in these proceedings, is a party, the Petitioner granted, demised, and leased all of its railroad and property of every description, including the capital stock of Boston and Providence Railroad Corporation in Rhode Island, a corporation united with the Petitioner, to said Old Colony Rail-

road Company for a term of 99 years from April 1, 1888 upon certain terms and conditions and in consideration of the covenants of said Old Colony Railroad Company therein contained. A copy of said lease is hereto annexed marked "Exhibit A."

By paragraph Fifth of said indenture, set forth at page 11 of Exhibit A herein, the lessee covenanted to pay to the lessor, as rent for the demised premises, the sum of $100,000 for each quarter in each year during the term of said lease, and for the expense of preserving the or- 188
ganization of the lessor, the further sum of $10,000 per annum during the first three years of said term, and the sum of $3,000 per annum for each year of said term thereafter. The lessee also covenanted to pay to the lessor, the Petitioner herein, the sum of $1,300,000 and also a sum equal to $5 per share upon its capital stock, as and for a dividend, out of the net earnings of the lessor up to the date of said lease. The lessee further covenanted to pay, as the same should become due, the interest on the indebtedness of the lessor, and upon such future indebtedness as should be created for the purpose of paying such indebtedness and other existing obligations and liabilities 189
of the lessor, and to that end to pay to the lessor such sums of money at such times as should enable it punctually to meet such interest as the same should become due. In addition the lessee covenanted to pay all taxes and assessments of every description upon the property, business, franchises and capital stock of the lessor as the same should be imposed or assessed, and to keep the lessor indemnified against the same during the term of the lease.

Paragraph Eleventh of said indenture, at page 17 of Exhibit A, provides that the lessor, the Petitioner herein, shall issue bonds from time to time for such sums as may be necessary to fund all of its outstanding liabilities which

are not thus paid, at a rate of interest as low as practicable, which bonds shall, at the request of the lessee, be extended as they mature for periods not exceeding the unexpired term of the lease on the most favorable terms then practicable. By said paragraph Eleventh the lessee agreed to establish and maintain a sinking fund in the hands of three Trustees, for the purpose of enabling it to meet said indebtedness of the lessor during the term of the lease; and the lessee further agreed thereby that such
191 sinking fund would be adequate to pay, and would pay, said indebtedness at its maturity, as thus funded and extended, and that it would make up any deficiency therein.

Paragraph Third of said indenture provides as follows:

> "*Third.* The lessee shall not assign this lease, nor underlet the whole or any part of the demised premises, except such portions thereof as may not be required by it for railroad uses, without the consent of the directors of the lessor. But if the lessee shall unite with, or sell, or lease its railroad to any other
> 192 railroad corporation, it may assign this lease to the corporation formed by such union, or to the corporation to which it thus sells or leases, such corporation becoming, and the lessee remaining, liable upon the covenants thereof."

3. Thereafter, on February 15, 1893, said Old Colony Railroad Company entered into a lease of that date with The New York, New Haven and Hartford Railroad Company, the principal debtor herein, a copy of which lease is annexed to the petition for reorganization filed by Old Colony Railroad Company herein, and is set forth at page 734 of the printed record of these proceedings. Said Old

Colony Railroad Company thereby demised, let and assigned to the principal debtor all of its railroad and property of every description for a term of ninety-nine years from March 1, 1893, expressly including therein all the right, title and interest of the lessor in and to any and all railroads operated by it under lease or otherwise, and in or to any stock and securities of other corporations owned or held by it, and in and to all contracts and obligations of or with other railroads, corporations, or individuals, and all income advantages and benefits to be 194 derived therefrom.

By the eleventh paragraph of said lease to The New York, New Haven and Hartford Railroad Company, set forth at page 741 of the printed record of these proceedings, the principal debtor covenanted as follows:

> "And the lessee further covenants to provide for the payment in the manner hereinbefore mentioned, of the principal of all funded indebtedness for the payment of which the lessor may be legally holden as the same shall from time to time mature, and to assume and pay all the other obligations of the lessor of every 195 name and nature as the same shall from time to time fall due, and to keep and perform all and singular the contracts relating to said demised premises and property now in force and binding on the lessor, whether arising under leases or otherwise, and as to property leased to the lessor the lessee shall be subject to the leases under which such property is held."

4. On October 23, 1935, The New York, New Haven and Hartford Railroad Company filed its petition for reorganization under Section 77, Chapter VIII, of the Acts of Congress relating to Bankruptcy, and said petition was

approved by this Court as properly filed under said Section 77. Subsequently, by Order numbered 5 of these proceedings, Trustees were appointed of the property of the principal debtor, including its interest in the properties of said Old Colony Railroad Company and of the Petitioner, and by Orders numbered 1 and 5 of these proceedings, said Trustees were authorized and directed to run, manage, maintain, operate, and keep in proper condition and repair the railroad and properties of the debtor,
197 wherever situated. By said Orders the Trustees were empowered, in their discretion, to disaffirm any of the existing executory leases or contracts of the debtor.

Under authority of Orders numbered 5 and 56 of this Court, the Trustees of the principal debtor notified the Old Colony Railroad Company on June 1, 1936 of their disaffirmance and rejection of the unexpired lease dated February 15, 1893 from Old Colony Railroad Company to the principal debtor. On June 3, 1936, the Old Colony Railroad Company filed its petition for reorganization in this proceeding, and on the same day said petition was approved by the Court as properly filed under Section 77
198 of Chapter VIII of the Acts of Congress relating to Bankruptcy.

By Order numbered 75 of this Court the Trustees of the principal debtor were also appointed Trustees of said Old Colony Railroad Company, and were directed by paragraph 6 thereof to continue to possess and operate the properties of said Old Colony Railroad Company, such operation to be for the account of Old Colony Railroad Company or the Trustees of its property. Paragraph 7 of said Order further directed said Trustees, either as Trustees of The New York, New Haven and Hartford Railroad Company or as Trustees of the Old Colony Railroad Company, to permit or make no default in the per-

formance of the terms of any lease or executory contract to which the Old Colony Railroad Company is a party, or in making all payments due in accordance with any such lease or executory contract, except upon advice of and with the consent of this Court previously obtained upon petition and after notice and hearing.

5. The nature of the respective interests of The New York, New Haven and Hartford Railroad Company, Old Colony Railroad Company, and Petitioner under the leases 200
heretofore referred to, in and to the leasehold interest in the property of the Petitioner, have not been determined by the Court. The question what effect the disaffirmance of the lease from Old Colony Railroad Company to The New York, New Haven and Hartford Railroad Company had upon said leasehold interest in the property of the Petitioner, and the question which of said corporations now holds said leasehold interest, have not been decided. It is vital to the preservation of your Petitioner's property that the Petitioner be given an opportunity to be heard upon these matters. The Petitioner, its shareholders, and all other persons interested in the 201
Petitioner or any of its property and assets, are directly concerned in the determination of these questions, and of many other questions arising preliminary to and in connection with a plan of reorganization in these proceedings. In order to protect the interests of its shareholders, and of all other persons interested in its property and assets, the Petitioner believes that it is necessary that it be permitted to intervene generally in these proceedings, so that it may receive notice of all applications and petitions to this Court, and may represent and protect the rights and interests of such persons.

202 *Petition of Boston and Providence Railroad Corporation for Leave to Intervene.*

WHEREFORE YOUR PETITIONER PRAYS that an order be entered herein:

1. Granting leave to the Petitioner to file this petition herein;

2. Granting leave to the Petitioner to intervene generally as a party to these proceedings;

203 3. Directing that notice of all applications, petitions, and motions, herein be served upon the Petitioner;

4. Granting to the Petitioner such other and further relief in the premises as to the Court may seem just and proper.

BOSTON AND PROVIDENCE RAILROAD CORPORATION,
By BENTLEY W. WARREN,
President.

Dated: May 25, 1937.

204 (Verification omitted in printing.)

205

Exhibit A Annexed to Petition of Boston and Providence Railroad Corporation for Leave to Intervene.

LEASE

BY THE

BOSTON & PROVIDENCE RAILROAD CORPORATION

OF ITS

RAILROAD AND PROPERTY

206

TO THE

OLD COLONY RAILROAD COMPANY

FOR

NINETY-NINE YEARS,

FROM

APRIL 1, 1888.

207

BOSTON:

ALFRED MUDGE & SON, 24 FRANKLIN STREET.

1888.

[CHAPTER 42.]

COMMONWEALTH OF MASSACHUSETTS.

In the year one thousand eight hundred and eighty-eight.

208 *Exhibit A.*

AN ACT

TO AUTHORIZE THE BOSTON AND PROVIDENCE RAILROAD CORPORATION TO LEASE ITS RAILROAD TO THE OLD COLONY RAILROAD COMPANY.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:—

SECTION 1. The Boston and Providence Railroad Corporation may make a lease of its road, property, and
209 franchise to the Old Colony Railroad Company, in such manner and upon such terms and conditions as are provided by the general laws of the Commonwealth for the leasing of railroads, and the Old Colony Railroad Company may accept the same lease; and if a sinking fund is required by the terms of such lease, the provisions of section seventy-four of chapter one hundred and twelve of the Public Statutes shall not apply to the investment thereof.

SECT. 2. This act shall take effect upon its passage.

HOUSE OF REPRESENTATIVES, Feb. 16, 1888.

210 Passed to be enacted.

CHAS. J. NOYES, Speaker.

IN SENATE, Feb. 17, 1888.

Passed to be enacted.

HALSEY J. BOARDMAN, President.

FEBRUARY 17, 1888.

Approved.

OLIVER AMES.

SECRETARY'S DEPARTMENT,
BOSTON, Feb. 17, 1888.

A true copy.
Witness the Seal of the Commonwealth.

HENRY B. PIERCE,
Secretary of the Commonwealth.

BOSTON AND PROVIDENCE RAILROAD CORPORATION.

At a meeting of the Directors of the Boston and Providence Railroad Corporation, held at Boston on the thirtieth day of March, 1888, it was voted—

That the Directors approve and agree to a lease of the railroad, property and franchise of this Corporation to the Old Colony Railroad Company, and to the terms thereof, as the same is herewith presented to the Directors, a copy whereof is herewith recorded, and that upon 212
the approval thereof by a majority in interest of the stockholders of this Corporation, and of the Old Colony Railroad Company, the President and Treasurer are hereby authorized and instructed to execute, acknowledge and deliver on behalf and in the name of this Corporation an indenture of lease of the same tenor as that so presented and recorded.

A true copy of the record.

Attest: WINSLOW WARREN,
Clerk of Corporation. 213

OLD COLONY RAILROAD COMPANY.

At a meeting of the Directors of the Old Colony Railroad Company, held at Boston on the seventh day of April, 1888, it was voted—

That the Directors approve and agree to a lease of the railroad, property and franchise of the Boston and Providence Railroad Corporation to this Corporation, and to the terms thereof, as the same is herewith presented to the Directors, a copy whereof is herewith recorded, and that upon the approval thereof by a majority in interest

of the stockholders of this Corporation, and of the Boston and Providence Railroad Corporation, the President and Treasurer are hereby authorized and instructed to execute, acknowledge and deliver on behalf, and in the name of this Corporation, an indenture of lease of the same tenor as that so presented and recorded.

A true copy of the record.

Attest: JOHN S. BRAYTON,
Clerk.

215

THIS INDENTURE, made this seventh day of April, in the year of our Lord one thousand eight hundred and eighty-eight, by and between the BOSTON AND PROVIDENCE RAILROAD CORPORATION, party of the first part, hereinafter called the lessor, and the OLD COLONY RAILROAD COMPANY, party of the second part, hereinafter called the lessee, both parties being corporations created by the laws of Massachusetts,

216 WITNESSETH: That the said parties, each for itself, its successors and assigns, and each, in consideration of the grants, covenants and agreements herein made by the other, have granted, covenanted and agreed, and do hereby GRANT, COVENANT AND AGREE, each to and with the other, and its successors and assigns, as follows, to wit:—

First. The lessor doth grant, demise and lease unto the lessee, its successors and assigns, all its railroad and property of every description, including therein its railroad, lands and wharves, branches, tracks, side-tracks, road-beds, superstructure, station houses, depot grounds, depots, viaducts, bridges, piers, shops, buildings and fixtures, whether within its location or not, and also its en-

gines, cars, rolling stock, machinery, tools, furniture, appliances, telegraph apparatus, equipment, and all rights, franchises, easements, privileges and appurtenances thereunto belonging, together with the right to demand and receive all tolls, rents, revenue, income and profits of the demised premises, including also therein all the right, title and interest of the lessor in and to any and all railroads operated by it, under lease or otherwise, and in or to any stock of other corporations owned by it, or held for it, all dividends thereon, and the right of voting on the same, and in and to all contracts and obligations of or with 218
other railroads, corporations or individuals, and all income advantages and benefits to be derived therefrom, hereby assigning and transferring unto the lessee, under the terms and provisions of this lease, and for the purposes thereof, all its railroad, railroad property, franchises and assets of every description, however described and wherever situated, excepting only its papers and books of account, and material and supplies, bills and accounts receivable, money and cash on hand, which papers and books of account shall be at all times open to the reasonable inspection of the lessee, so far as required for its protection under this lease. 219

To Have and to Hold all and singular the demised premises to the lessee, its successors and assigns, for and during the term of ninety-nine years from and after the first day of April, in the year of our Lord one thousand eight hundred and eighty-eight: the lessee paying unto the lessor the rent hereby reserved, and keeping and performing the terms, conditions and agreements hereinafter contained to be by it kept and performed.

Second. The lessor will at all times, upon reasonable request, execute and deliver any and all instruments, and

take any other action, at the request and expense of the lessee, that may be requisite or necessary to confirm, carry out, effectuate and establish the terms of this lease and agreement to its full meaning and intent, and to vest in and secure to the lessee the full use and enjoyment of the railroads and property demised or intended to be demised hereby. The lessor will during the continuance of this lease and agreement maintain its existence and organization as a corporation, and to that end will comply with all the requisites and forms of law, and it will, at the
221 request and expense of the lessee, do and perform all such acts, lawful and consistent with its rights hereunder, as shall be proper and necessary for the due protection, preservation and full enjoyment by the lessee of all the property, rights, franchises and interests hereby demised or granted to it, and to carry out the true intent and meaning of this instrument; and in default thereof it hereby authorizes the same to be done by the lessee, or by its agents, successors and assigns, in the name and as the act of the lessor; and the lessee, its successors and assigns may, at its or their own expense and charge, and for its or their own use and benefit, use the name, fran-
222 chise and corporate power of the lessor in commencing, prosecuting or defending any suit or proceeding, or taking any action which may be necessary or proper to enable it or them to defend, assert, exercise or maintain any right or privilege secured to it or them by this instrument, or arising from the title or possession thereunder, or to enforce payment of damages for injuries thereto, and to give due receipts, acquittances and discharges on account thereof and in relation thereto.

Third. The lessee shall not assign this lease, nor underlet the whole or any part of the demised premises, except such portions thereof as may not be required by it for

railroad uses, without the consent of the directors of the lessor. But if the lessee shall unite with, or sell, or lease its railroad to any other railroad corporation, it may assign this lease to the corporation formed by such union, or to the corporation to which it thus sells or leases, such corporation becoming, and the lessee remaining, liable upon the covenants thereof.

Fourth. The lessee shall observe and perform all the provisions of contracts of the lessor with the owners of railroads now leased or operated by it, and shall pay the 224
rent and perform the covenants, in the lease of the Attleboro Branch Railroad to the lessor, dated the thirty-first day of December, A. D. 1870; and at the termination of said lease, the same shall, if requested by the lessee, and if it can be done, be renewed by the lessor, from time to time upon the most favorable terms practicable, for a term or terms not exceeding the then unexpired term of this lease; and being so renewed, shall be subject to all the provisions of this lease and agreement, as effectually as if now existing and herein included, and upon the expiration, or earlier termination of this lease, shall be re-
assigned to, and inure to the benefit of, the lessor. 225

Fifth. The lessee shall pay to the lessor, as rent for the demised premises, the sum of one hundred thousand dollars for each quarter in each year during the term of this lease, to wit: On the first day of July, the first day of October, the first day of January, and the first day of April, in each and every year (the first payment to be made on the first day of July, A. D. 1888), and at the same rate for any portion of a quarter, at the office of the treasurer of the lessee, in the city of Boston; and shall also pay to the lessor, during the first three (3) years of said term, the sum of ten thousand dollars ($10,000) per annum, in equal quarterly payments, on the same days as said rent is payable; and each and every

year thereafter, during said term, the sum of three thousand dollars ($3,000), in like manner, as and for the expense of preserving the organization of the lessor, as herein agreed to be preserved and kept up. And the lessee will, on the first day of May, 1888, pay to the lessor the sum of thirteen hundred thousand dollars ($1,300,000), and also a sum equal to five dollars ($5) per share upon its capital stock, as and for a dividend, out of the net earnings of the lessor up to the date of this lease. The lessee shall also pay, as the same becomes due, the interest on the indebtedness of the lessor (a schedule whereof 227 is hereto annexed), and upon such future indebtedness as shall be created for the purpose of paying such indebtedness and other existing obligations and liabilities of the lessor, in the manner herein provided, and to that end shall pay to the lessor such sums of money at such times as shall enable it punctually to meet such interest as the same becomes due. And the lessee shall also pay all taxes and assessments, whether in the nature of taxes, now in being or not, of every description, national, state and municipal, or otherwise, upon the property, business, franchises and capital stock of the lessor as the same shall be 228 imposed or assessed, and shall at all times keep the lessor indemnified against the same during the term of this lease.

Sixth. The lessee shall at its own expense maintain and keep the railroad and property herein demised, and the railroad and property of the Boston & Providence Railroad Corporation in Rhode Island, hereinafter called the "Rhode Island Company," in as good order and condition as the same now are, and use and operate them in accordance with the charter of the lessor, and the laws of the Commonwealth of Massachusetts, and of the State of Rhode Island, and of the United States, so far as the

same are respectively applicable, shall make all returns required of it by law, and furnish the lessor with such statements and accounts as shall enable it to make all returns by law required of it, and shall furnish all cars, engines, rolling stock, and equipment required, in addition to the like property hereby demised for the due and proper use and operation thereof, in such manner as at all times to meet the demands of the public service, and to furnish equal facilties for travel and business with those now afforded by the lessor, and it shall apply the proceeds of rolling stock and other personal property here- 230
in demised, which it may deem advisable to sell, and which (with the exception of stocks of other corporations) it is hereby authorized to sell at its discretion, so as to substitute therefor other like property for use in the maintenance and operation of said railroad and property of equal value.

Seventh. The lessee shall furnish the officers of the lessor with proper accomodations at the station of the demised railroad in Boston, and with free transportation for themselves and an inspector over the railroad hereby demised (it being understood that such officers shall not exceed a president, treasurer, clerk, and six directors); 231
and shall permit some suitable person, appointed by the directors of the lessor as an inspector of the demised property, to examine the same once in each year, so far as may be necessary to ascertain the condition thereof, and shall pay the reasonable expense of such annual inspection, in addition to the rent herein reserved.

Eighth. The lessee will, during the continuance of this lease, protect and save harmless the lessor and the Rhode Island Company against all actions or claims for injury to persons or property during the term thereof, by reason of any want of repair of the demised road and property

or appurtenances, or of the road, property and appurtenances of the Rhode Island Company, or any want of care and skill in the operation and management of the same, or by reason of any defects therein; and will not permit the lessor or the Rhode Island Company to be subjected to any payment, penalty or forfeiture, for violation of law in any respect in relation to the maintenance and operation of their said roads and property; but will indemnify and save them harmless against all loss, cost, damage or liability caused by it, or arising out of the use
233 and operation of said roads and property, whether by reason of any contract, statute, negligence or misfeasance, or by reason of the neglect of the lessee or lessor to use and operate said railroad and property as required by law during the continuance of this lease. The lessee will make all permanent improvements on said railroads and property at its own expense; will keep the demised premises reasonably insured, and apply the proceeds of any insurance to restoring and replacing the property destroyed, or otherwise to the benefit of the demised property; and at the expiration or earlier termination of this lease, it will return said demised road, and property to
234 the lessor as a railroad between Boston and Providence, with its now existing branches and suitably equipped and provided with depots, stations, shops, and other structures, of at least equal value with those now existing thereon, and in as good order and condition as the same now are, together with all permanent improvements thereon; and with rolling stock, machinery, tools, furniture, appliances, telegraph apparatus, and equipment, of equal value with that hereby demised according to the appraisal thereof.

Ninth. The lessor will, upon the written request of the lessee, from time to time, convey to such person or per-

sons as the lessee may appoint in such request, such portions and parcels of the real estate owned by the lessor outside of its location, and not required by the lessee for railroad purposes, as the lessee may designate, and upon such reasonable terms and for such reasonable price as it may direct, at its expense, the proceeds to be received by the lessee, but upon an express agreement, however, by the lessee, that all proceeds thereof, or a sum equal thereto, shall be, or shall previously have been, from the funds of the lessee, applied to additions other than improvements upon the railroads of the lessor or their 236
branches, or connected with their real estate, which shall thereupon become the property of the lessor, and subject to the provisions of this instrument, and if at the expiration or earlier termination of this lease the lessee shall not have expended in such additions a sum equal to the proceeds of the real estate so conveyed, the balance unexpended shall be paid over to the lessor without interest. But the lessor shall not be obliged, unless its directors consent, to convey any of its real estate in Boston east of the present Dartmouth Street bridge, or of the tract of land owned by it near the junction of its main road with the Dedham branch thereof, and between said 237
branch and the New York and New England Railroad, containing about thirty-three (33) acres, upon which tract, unless thus previously conveyed, and unless it shall return the shops of the lessor now existing, the lessee shall, if not otherwise agreed with the directors of the lessor, place the shops which it is to return to the lessor upon the expiration or earlier termination of this lease, under the Eighth Article hereof.

Tenth. The capital stock of the Boston & Providence Railroad Corporation in Rhode Island (herein called the Rhode Island Company) owned by the lessor, embraced

within the terms of this lease, and assigned to the lessee at the time of the delivery hereof, shall be held and used by the lessee during the term of this lease, for the purpose of maintaining the road and property of said Rhode Island Company, as a practical extension and portion of the road and property of the lessor, and at the termination of this lease shall be reassigned to the lessor in such manner as to return to it the entire ownership of the present road and property of said Rhode Island Company, and all improvements thereon. But if the Rhode Island
239 Company or the lessee shall, for the purpose of improving terminal facilities at Providence, or other necessary railroad purposes in Rhode Island, exchange land for other land therein of equal value, or sell land and purchase other land of equal value for the same purpose, the land thus obtained by exchange or purchase shall be received by the lessor at the expiration or earlier termination of this lease, in place of such land so exchanged or sold.

Eleventh. The lessor hereby assigns, transfers and delivers to the lessee all its material and supplies, bills and
240 accounts receivable, money and cash on hand to be by the lessee applied (at the value thereof to be fixed by appraisal), to the payment of the dividend herein agreed to be paid upon the capital stock of the lessor on the first day of May, 1888, and to the payment of outstanding liabilities of the lessor. The lessor shall issue bonds for periods not exceeding the longest allowed by law, and at a rate of interest as low as practicable, for such sums as may be necessary to fund all its outstanding liabilities which are not thus paid, including the expense of defending and adjusting all claims and suits against the lessor, arising in the past use and operation of the demised premises, or of any railroad operated by the lessor,

which bonds shall, at the request of the lessee, be extended as they mature for periods not exceeding the unexpired term of this lease on the most favorable terms then practicable.

To provide for the payment of the net indebtedness of the lessor as thus ascertained and funded, the lessee shall, within six months after the same is thus approximately ascertained, and not later than January 1st, 1890, establish a sinking fund in the hands of three trustees, appointed and maintained by its directors from their own number, and shall make such annual or more frequent payments 242
thereto as may be necessary, with interest at four per cent per annum, compounded semi-annually, to cause it to meet said indebtedness during the term of this lease. And the lessee hereby agrees that such sinking fund shall be adequate to pay, and shall pay, said indebtedness at its maturity, as thus funded and extended, and that it will make up any deficiency therein. All bonds thus issued shall be certified by the lessor and lessee as issued under the provisions of this lease.

Twelfth. The lessee shall not sell or otherwise dispose of any of the stocks herein demised and transferred to it, 243
except by assignment of this lease in case of its union with, or sale, or lease of its railroad to some other railroad corporation, as provided in Article Third hereof, in which case it may assign them to the corporation formed by such union, or to which it thus sells or leases, to be held by such corporation in the same manner and under the same restrictions as the same are herein provided to be held by the lessee. But the lessee, with the consent of the Board of Directors of the lessor, may, at any time, sell and transfer all or any portion of the stocks of other corporations embraced within the terms of this instrument and hereby demised, except the stock of the

Rhode Island Company, and in case of such sale, unless the lessee shall have otherwise disposed of the proceeds thereof, by the consent of the directors of the lessor, it shall pay over to the lessor, at the expiration or earlier termination of this lease, the price received, without interest, in full of all obligation upon its part to return such stocks to the lessor under the provisions of this instrument. Provided, however, that the stocks of the Union Freight Railroad and of the Providence, Warren and Bristol Railroad, if not thus sold, shall be returned
245 to the lessor, in such manner as to give it the same proportionate interest in and control over the present roads and property of such corporations with all permanent improvements thereon, as the lessor now has thereby.

Thirteenth. If this lease shall be terminated within the demised term of ninety-nine years without fault of the lessee, the lessor shall pay the lessee a proportional part (having regard to the unexpired portion of the lease and other circumstances) of its indebtedness which may have been funded by the lessor and paid by the lessee under the provisions of this instrument, [but not including in-
246 terest which may have been paid thereon], and of the cost of such permanent improvements as may have been made and paid for by the lessee upon the demised premises; and if the parties are unable to agree with reference thereto, the same shall be submitted to the decision of three arbitrators, one chosen by each party, and the other by the two thus chosen, whose decision shall be final; and if at any time it shall happen that this lease shall be or become invalid, or shall be terminated without the fault of either party, then, and in such case, each party shall be restored, as nearly as may be, to the condition in which it stood before the lease, it being understood that the rent and interest paid by the lessee on the

funded debt of the lessor shall be considered equivalent to the value of the occupation, but that the lessor is not to repay any part of the money agreed to be paid to it by the lessee on the first day of May, 1888, under the provisions of Article Five hereof.

Fourteenth. This lease and agreement are upon the condition that if the lessee shall neglect and refuse to pay the rental herein, reserved, or any part thereof, or to pay the interest upon the indebtedness of the lessor, as herein agreed to be paid, for more than thirty days after 248
the same shall become due and payable; or if the lessee shall continue to neglect or fail to perform any or either of the other covenants, on its part to be performed, for more than six months after written notice from the lessor of such neglect or failure, and that, if continued, it will be regarded as a forfeiture of this lease, then, and in either of such cases, the lessor may lawfully, at any time after the lapse of said thirty days or six months, as the case may be, and while such neglect or default continues, without further notice or demand, enter into or upon the leased premises, or any part thereof, in the name of the whole, and repossess the same as of its former estate, 249
and expel the lessee, and those claiming under it, without prejudice to any remedies which might otherwise be used for arrears of rent, or preceding breach of covenants; but nothing herein shall be considered to work a forfeiture of this lease when the omission or delay in performing the obligations hereunder—saving only the payment of rent and of interest—results from causes reasonably beyond the control of the lessee, or when from any cause such omission or delay ought not in equity to work a forfeiture; and in case of disagreement as to the duty of the lessee in performing any of its covenants,—except those for the payment of rent and of interest,—the failure

to perform the same shall not entitle the lessor to enter for breach of covenant until the lapse of sixty days after the final determination of the question by suit or arbitration.

Fifteenth. That the property herein demised and to be accounted for at the expiration or earlier termination of this lease may be accurately determined, there shall be made, as of the day when this lease takes effect, a full, complete and particular inventory, and description of all
251 estate and property, real and personal, belonging to the lessor, and coming into the possession of the lessee by virtue of this lease, and that the value of the engines, cars, rolling stock, machinery, tools, furniture, appliances, telegraph apparatus and equipment hereby demised, and to be returned may be fixed, an appraisal thereof shall be made. Such inventory, description and appraisal shall be made by two competent persons, one selected by each party. In case of their disagreement, they shall refer the matter in difference to some third person, whose decision shall be final. Such inventory, description and appraisal shall be made in duplicate, and an original furnished to
252 each party, and shall be evidence of the nature, value and condition of the property at the time it is made in all cases in which any question of such nature, condition or value may arise.

Sixteenth. In case of any question or controversy arising between the parties hereto as to the meaning and intent of this instrument, or any part thereof, or as to anything done thereunder, or growing out thereof, the same shall be referred to the arbitration of two referees, one selected by each party, who shall have power, in case of their disagreement, to choose a third, and the award of

the referees so selected, or of a majority of them, shall be final and binding upon the parties.

In Witness Whereof, the Boston and Providence Railroad Corporation, by its President, Henry A. Whitney, and its Treasurer, Benjamin B. Torrey, and the Old Colony Railroad Company, by its President, Charles F. Choate, and its Treasurer, John M. Washburn, have to this and one other instrument of even date and tenor herewith, signed their corporate names and affixed their corporate seals, the day and year first above-written. 254

The Boston and Providence Railroad Corporation.
By Henry A. Whitney, President.
Benjamin B. Torrey, Treasurer.

Old Colony Railroad Company.
By Charles F. Choate, President.
John M. Washburn, Treasurer.

255

(Seal of)
(Old Colony)
(Railroad Company.)

(Seal of)
(Boston and Providence)
(Railroad Corporation.)

256 *Exhibit A.*

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. BOSTON, April 11, 1888.

Then personally appeared Henry A. Whitney, as President, and Benjamin B. Torrey, as Treasurer, of the Boston and Providence Railroad Corporation, and acknowledged the above instrument to be the free act and deed of said corporation.

257 Before me,

J. H. BENTON, JR.,
Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. BOSTON, April 11, 1888.

Then personally appeared Charles F. Choate, as President, and John M. Washburn, as Treasurer, of the Old Colony Railroad Company, and acknowledged the above
258 instrument to be the free act and deed of said Old Colony Railroad Company.

Before me,

J. H. BENTON, JR.,
Justice of the Peace.

Exhibit A.

INDEBTEDNESS OF BOSTON AND PROVIDENCE RAILROAD CORPORATION, APRIL 1, 1888.

(See Article Fifth of Lease.)

NOTES.	AMOUNT.	RATE.	WHEN DUE.
New Bedford Inst. for Savings	$ 50,000	4%	July 1, 1888
Worcester County Inst. for Savings	50,000	4	" "
Provident Inst. for Savings	100,000	5½	Aug. 23, 1888
" " " "	200,000	5½	Aug. 26, 1888
Providence " " "	50,000	5	Nov. 2, 1888
" " " "	50,000	5	" "
" " " "	50,000	5	" "
" " " "	50,000	5	" "
New Bedford Inst. for Savings	100,000	5	Dec. 1, 1888
Salem Five Cents Savings Bank	50,000	5	" "
" " " " "	50,000	5	" "
" " " " "	25,000	5	Dec. 3, 1888
Fall River Savings Bank	25,000	5	" "
New Bedford Inst. for Savings	25,000	5	" "
" " " " "	25,000	5	" "
Boston, Five Cents Savings Bank	100,000	5	Jan. 12, 1889
Institute for Savings in Roxbury	50,000	5	Jan. 14, 1889
Providence Inst. for Savings	100,000	5	Jan. 17, 1889
Salem Five Cents Savings Bank	20,000	4	July 1, 1891
Worcester North Savings Inst., Fitchburg	20,000	4	July 1, 1889
Warren Inst. Savings, Charlestown	60,000	4	July 1, 1889
Providence Inst. for Savings	60,000	4	July 1, 1889
	$1,310,000		

260

BONDS.		RATE.	WHEN DUE.
Negotiable bonds held by sundry persons..	500,000	7%	July 1, 1893
	$1,810,000		

261

I certify that the foregoing is a correct schedule of all outstanding notes and bonds of the Boston and Providence Railroad Corporation on the first day of April, 1888.

BENJAMIN B. TORREY,
Treasurer B. & P. R.R. Corp.

262 *Exhibit A.*

OLD COLONY RAILROAD,

TREASURER'S OFFICE,
BOSTON, MASS., April 7, 1888.

I certify that the amount of capital stock of the Old Colony Railroad Company issued to this date is 113,648 shares.

JOHN M. WASHBURN, Treasurer.

263 At a special meeting of the stockholders of the Old Colony Railroad Company, duly notified and held at Boston, Massachusetts, on Saturday, the seventh day of April, 1888, to act upon the subject of approving a lease of the road of the Boston and Providence Railroad Corporation to this Corporation, upon the terms agreed upon by the Directors of both Corporations, the following vote was adopted by a vote of 63,787 shares, being a majority in interest of the stockholders.

264 WHEREAS, the Directors of the Boston and Providence Railroad Corporation, and the Directors of the Old Colony Railroad Company, have agreed upon the terms of a lease by the first-named Corporation of its railroad, property and franchise, to the last-named Company, for the term of ninety-nine years from and after the first day of April, 1888, a copy of which lease has this day been read to the stockholders of this Company and placed upon the records thereof; *now, therefore,* the stockholders of the Old Colony Railroad Company do sanction and confirm said agreement and approve the terms of said lease, and hereby authorize the Directors of this Company, in its name and on its behalf, to cause the same to be executed, acknowledged and delivered by their

President and Treasurer, and to affix thereto the name and corporate seal of this Company.

A true copy of the record.

Attest: JOHN S. BRAYTON,
Clerk.

BOSTON AND PROVIDENCE RAILROAD,
TREASURER'S OFFICE,
BOSTON, MASS., April 11, 1888. 266

I certify that the amount of the capital stock of the Boston and Providence Railroad Corporation issued to this date is 40,000 shares.

BENJAMIN B. TORREY, Treasurer.

At a special meeting of the Boston and Providence Railroad Corporation, duly notified and held at Boston, Massachusetts, on Wednesday, the eleventh day of April, 1888, to act upon the subject of approving a lease of its road to the Old Colony Railroad Company, upon the terms agreed upon by the Directors of both Corporations, 267 the following vote was adopted by a vote of 26,767 shares, being a majority in interest of the stockholders.

WHEREAS, the Directors of the Boston and Providence Railroad Corporation, and the Directors of the Old Colony Railroad Company, have agreed upon the terms of a lease by the first-named Corporation of its railroad, property and franchise, to the last-named Company for the term of ninety-nine years from and after the first day of April, 1888, a copy of which lease has this day been read to the stockholders of this Corporation and

placed upon the records thereof; *now; therefore,* the stockholders of the Boston and Providence Railroad Corporation do sanction and confirm said agreement and approve the terms of said lease, and hereby authorize the Directors of this Corporation, in its name and on its behalf, to cause the same to be executed, acknowledged and delivered by their President and Treasurer, and to affix thereto the name and corporate seal of this Corporation, and to make such transfers and contracts, and
269 to do all such acts as may be necessary to fully carry into effect and accomplish the purposes of said lease.

A true copy of the record.

Attest: WINSLOW WARREN,
Clerk of Corporation.

Order Permitting Intervention of Boston and Providence Railroad Corporation.

270

[SAME TITLE]

ORDER No. 179.

On this day, coming on to be heard the petition, verified May 25th, 1937, of Boston and Providence Railroad Corporation for leave to intervene, and for good cause shown, the Court being duly advised in the premises finds that the petitioner should be allowed to intervene herein. It is therefore ORDERED:

Order Permitting Intervention of Boston and Providence Railroad Corporation. 271

1. That Boston and Providence Railroad Corporation be and it hereby is permitted to intervene generally herein, and it is hereby admitted and constituted as a general party to these proceedings for the purpose of protecting its rights and the rights of its shareholders and of other persons interested in its property and assets.

2. That the Court reserves the right, without notice to Boston and Providence Railroad Corporation, to enter orders relative to the administration of the proceedings 272
and the operation of the property being administered by the Court in these proceedings, including the property of Boston and Providence Railroad Corporation, where in the opinion of the Court no interests of the shareholders of the Boston and Providence Railroad Corporation or of other persons interested in its property and assets will be substantially affected by such orders in any adverse manner.

3. That the filing on May 26, 1937, by the Boston and Providence Railroad Corporation of its petition for leave to intervene be and it hereby is authorized and approved 273
as of said date, and that the Debtor and the Trustees of the Debtor may file answers thereto within twenty days from the date hereof, but shall not be deemed to admit the allegations of said petition by not answering.

ENTER:

CARROLL C. HINCKS,
U. S. D. J.

New Haven, Connecticut
May 27, 1937.

274 **Petition of Bankers Trust Company, as Trustee Under the First and Refunding Mortgage of the Principal Debtor, for an Order Modifying Order No. 75 Herein so as to Provide that the Trustees of the Property of the Principal Debtor Shall Cease to Make Any Cash Payments Under the Terms of the Lease of the Boston and Providence Railroad Corporation, dated April 7, 1888.**

(Filed October 7, 1937.)

[SAME TITLE]

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275 PETITION FOR ORDER No. 217.

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT:

The petition of Bankers Trust Company, as Trustee, respectfully shows:

FIRST: That your petitioner is the Trustee under the First and Refunding Mortgage of the Principal Debtor, dated December 9, 1920, and is a creditor of the Principal Debtor.

SECOND: Upon information and belief: That the Boston
276 and Providence Railroad Corporation leased its railroad and property of every description to the Old Colony Railroad Company for a term of ninety-nine years from April 1, 1888, by lease dated April 7, 1888 (hereinafter sometimes called "the Boston and Providence lease"), and that, thereafter, the Old Colony Railroad Company leased its railroad and property of every description, including all its right, title and interest in and to any and all railroads operated by it, under lease or otherwise, to the Principal Debtor for a term of ninety-nine years from March 1, 1893, by lease dated February 15, 1893 (hereinafter sometimes called "the Old Colony lease"). That said Old Colony lease provides, *inter alia*, as follows:

"And the lessee further covenants to provide for the payment in the manner hereinbefore mentioned, of the principal of all funded indebtedness for the payment of which the lessor may be legally holden as the same shall from time to time mature, and to assume and pay all the other obligations of the lessor of every name and nature as the same shall from time to time fall due, and to keep and perform all and singular the contracts relating to said demised premises and property now in force and binding on the lessor, whether arising under leases or otherwise, 278 and as to property leased to the lessor, the lessee shall be subject to the leases under which such property is held."

That a copy of the Old Colony lease appears at page 737 of the printed record herein and a copy of the Boston and Providence lease will be filed with the Court at the hearing on this petition and petitioner begs leave to refer to said leases with the same force and effect as if they were fully set forth herein.

THIRD: That paragraph Fifth of the Boston and Providence lease reads as follows: 279

"*Fifth.* The lessee shall pay to the lessor, as rent for the demised premises, the sum of one hundred thousand dollars for each quarter in each year during the term of this lease, to wit: On the first day of July, the first day of October, the first day of January, and the first day of April, in each and every year (the first payment to be made on the first day of July, A. D., 1888), and at the same rate for any portion of a quarter, at the office of the treasurer of the lessee, in the city of Boston; and shall also pay to the lessor, during the first three (3) years of said term, the sum of ten thousand dollars ($10,000) per

annum, in equal quarterly payments, on the same days as said rent is payable; and each and every year thereafter, during said term, the sum of three thousand dollars ($3,000), in like manner, as and for the expense of preserving the organization of the lessor, as herein agreed to be preserved and kept up. And the lessee will, on the first day of May, 1888, pay to the lessor the sum of thirteen hundred thousand dollars ($1,300,000), and also a sum equal to five dollars (5) per share upon its capital stock, as
281 and for a dividend, out of the net earnings of the lessor up to the date of this lease. The lessee shall also pay, as the same becomes due, the interest on the indebtedness of the lessor (a schedule whereof is hereto annexed), and upon such future indebtedness as shall be created for the purpose of paying such indebtedness and other existing obligations and liabilities of the lessor, in the manner herein provided, and to that end shall pay to the lessor such sums of money at such times as shall enable it punctually to meet such interest as the same becomes due. And the lessee shall also pay all taxes and assessments,
282 whether in the nature of taxes, now in being or not, of every description, national, state and municipal, or otherwise, upon the property, business, franchise and capital stock of the lessor as the same shall be imposed or assessed, and shall at all times keep the lessor indemnified against the same during the term of this lease."

Upon information and belief: That there have been issued by the Boston and Providence Railroad Corporation and are now outstanding $2,170,000 principal amount of its 5% Gold Debenture Bonds, due July 1, 1938, and $4,000,000 par value of its capital stock. That the cash payments required by the terms of said paragraph "Fifth"

of said Boston and Providence lease exclusive of payments in the nature of taxes amount to an annual aggregate of $511,500.

FOURTH: Upon information and belief: That the Trustees of the property of the Principal Debtor own the equity in $524,600 par value of the capital stock of Boston and Providence Railroad Corporation, which is pledged under a bank loan, and in $327,200 par value held in sinking funds, or in aggregate par value of $851,800.

FIFTH: That on November 30, 1935, Order No. 17, entitled "Order Providing That in Case of Later Disaffirmance Of Leases Payments Made Do Not Constitute Payments Under Terms of Lease" was entered herein and petitioner refers to said Order with the same force and effect as if it were fully set forth herein. Paragraph 2 of said Order reads as follows: 284

> "(2) That in case such leases shall be disaffirmed or rejected by the Debtor, or such Trustees of the property of the Debtor as may hereafter qualify, or under a plan of reorganization, the operation of the leased properties shall have been and said payments shall be deemed to have been made for the account of the lessors, and such payments shall be recovered, set-off, or made and charged, on the earnings and/or properties of the lessors prior to any mortgage or other lien thereon, by such method as the Court shall determine and further reserving all rights and equities of the parties arising from such payments." 285

SIXTH: Upon information and belief: That the Trustees of the property of the Principal Debtor on June 2, 1936, disaffirmed and rejected the unexpired lease, dated February 15, 1893, from Old Colony Railroad Company to The New York, New Haven and Hartford Railroad Company.

SEVENTH: That paragraph 7 of Order No. 75 (which was entered herein on June 18, 1936) reads as follows:

"7. That, without limitation of any powers, authority, or direction herein given to the Trustees of The New York, New Haven and Hartford Railroad Company, they are hereby specifically directed

(a) to pay on June 30, 1936 for the account of Old Colony Railroad Company, or of the Trustees of its property, the rent in the sum of one hundred
287 thousand dollars ($100,000) payable on July 1, 1936 under the terms of a certain lease from Boston and Providence Railroad Corporation to Old Colony Railroad Company, dated April 7, 1888, and also on July 1, 1936 the sum of fifty-four thousand two hundred and fifty dollars ($54,250), the interest then falling due under the provisions of said lease dated April 7, 1888 upon the 5% Debentures (maturing July 1, 1938) of Boston and Providence Railroad Corporation.

(b) to pay for the account of Old Colony Railroad Company forthwith, if the same has not been
288 paid, the quarterly installment of federal income taxes of Old Colony Railroad Company due June 15, 1936 in the sum of sixty-one thousand six hundred and twenty-eight dollars and ninety cents ($61,628.90)

and the Trustees of The New York, New Haven and Hartford Railroad Company, either as such or as Trustees of Old Colony Railroad Company, shall not intentionally permit or make any default in the performance of the terms of any lease or executory contract to which Old Colony Railroad Company is a party, or in making all payments due in accordance

with any such lease or executory contract, unless and except upon the advice of and with the consent of this Court previously obtained upon petition and after hearing, notice of which hearing shall have been given to all interested parties (as the Court may direct) more than twenty days prior to such hearing."

EIGHTH: Upon information and belief: That the Trustees of the property of the Principal Debtor have recently completed, for the twelve months ended May 31, 290
1937, a segregation of revenues from and expenses of the Principal Debtor's leased and mortgaged lines, which petitioner believes to be substantially accurate and on a reasonable basis, and which shows that the railroad of the Boston and Providence Railroad Corporation was operated by the Trustees of the Principal Debtor during that period at a loss of $568,970.37. That said deficit is before (a) cash payments under the terms of the Boston and Providence lease or (b) allocation against the Boston and Providence Railroad Corporation of interest in the amount of approximately $55,780 paid on equipment trust obligations of the Principal Debtor, or (c) intra-system 291
charges representing credits in favor of the rest of the system of the Principal Debtor (including the railroad of the Old Colony Railroad Company and the railroad of the Providence, Warren and Bristol Railroad Company all of whose railroad and property of every description was leased to the Old Colony Railroad Company, by lease, dated December 1, 1891) for services performed on account of, or facilities used by said Trustees in the operation of the railroad of said Boston and Providence Railroad Corporation, in the amounts, for said twelve months period, of (1) $83,907.24 for handling company coal, (2) $176,650.91 for interest on investment in equipment, and

(3) $786,241.17 for interest on investment in facilities. That the sum of said items specified in (b) above and in (1), (2) and (3) above, plus said loss of $568,970.37 shows a deficit in the operation of the railroad of the Boston and Providence Railroad Corporation for said period of $1,671,549.69, before cash payments under the terms of the Boston and Providence lease at the rate of $511,500 annually, and after including such cash payments under the terms of the Boston and Providence lease, shows a deficit of $2,183,049.69 less payments re-
293 ceived on the shares of stock mentioned in paragraph Fourth hereof to the extent of $72,403, or a net deficit of $2,110,646.69 for said period. That such segregation also shows that the losses resulting to the Estate of the Principal Debtor from the operation of the railroad of the Boston and Providence Railroad Corporation, including only deficits in net income before payment of interest on equipment obligations or intra-system charges, but after accrual of net cash payments under the terms of said Boston and Providence lease (i.e., cash payments, less payments received on the stock mentioned in Paragraph Fourth hereof) have totaled $1,008,067.37 for the
294 period June 1, 1936 to June 1, 1937 and that at that rate they have aggregated approximately $1,344,000 for the period June 1, 1936 to October 1, 1937. That the foregoing calculations do not take into account any of the losses which have been sustained by the operation of the railroad of the Boston and Providence Railroad Corporation from October 23, 1935 to June 1, 1936, or any cash payments under the terms of the Boston and Providence lease during the same period or any capital expenditures upon the railroad of the Boston and Providence Railroad Corporation.

NINTH: Upon information and belief: That, in addition to the losses resulting from the operation of the railroad

of the Boston and Providence Railroad Corporation and the net cash payments under the terms of the Boston and Providence lease, the cash resources of the Estate of the Principal Debtor have been drained throughout the pendency of these proceedings by the operating losses of the railroad of the Old Colony Railroad Company. That the segregation mentioned in Paragraph Eighth hereof shows that such losses from the operation of the railroad of the Old Colony Railroad Company, calculated upon the basis set forth in said segregation, for the period June 1, 1936 to October 1, 1937, have amounted to ap- 296
proximately $2,400,000, before the allocation of any part of the interest paid on the Principal Debtor's equipment trust obligations or before any intra-system charges for handling company coal or for interest on investment in equipment or for interest on investment in facilities. That the addition of interest on equipment trust obligations and the intra-system charges would increase such losses to approximately $2,700,000 for the same period. That, for the period from June 1, 1936 to October 1, 1937, calculated upon the basis set forth in said segregation, the combined operations of the railroad of Old Colony Railroad Company and the railroad of the Boston 297
and Providence Railroad Corporation have resulted in a deficit of approximately $3,700,000, after net cash payments under the Boston and Providence lease, but before allocation of interest on equipment trust obligations of the Principal Debtor or intra-system charges for handling company coal, or for interest on investment in equipment or for interest on investment in facilities, and, calculated upon the basis set forth in said segregation, have resulted for the same period in a deficit of approximately $5,600,000 after allocation of interest on equipment trust obligations of the Principal Debtor and intra-system charges. That the foregoing calculations do not take into account any capital expenditures for any period

or any losses sustained by the operation of the railroad of the Old Colony Railroad Company, or the railroad of the Boston and Providence Railroad Corporation, for the period from October 23, 1935 to June 1, 1936, or any cash payments under the terms of the Old Colony lease or under the terms of the Boston and Providence lease for the same period, or any losses sustained by the operation of the railroad of the Providence, Warren and Bristol Railroad Company or any cash payments under the terms of the lease of the Providence, Warren and
299 Bristol Railroad Company, dated December 1, 1891, which was rejected and disaffirmed by the Trustees of the property of the Old Colony Railroad Company on February 11, 1937.

TENTH: Upon information and belief: That the Trustees of the property of the Principal Debtor have, during the period October 23, 1935 to August 31, 1937, made capital expenditures (1) upon the railroad of the Boston and Providence Railroad Corporation in the aggregate amount of $152,777.24, (2) upon the railroad of the Providence, Warren and Bristol Railroad Company in the aggregate
300 amount of $30,907.16, and (3) upon the railroad of the Old Colony Railroad Company in the aggregate amount of $480,067.45, making a total aggregate amount of $663,751.85 of capital expenditures upon the three railroads formerly comprising the Old Colony System. That the cash payments made (1) under the terms of the Old Colony lease from October 23, 1935 to February 1, 1936 amounted to $817,157.00; (2) under the terms of the Boston and Providence lease from October 23, 1935 to September 30, 1937 amounted to $1,023,000 and (3) under the terms of the lease of the property of the Providence, Warren and Bristol Railroad Company, dated December 1, 1891, from October 23, 1935 to June 30, 1936 amounted

to $53,771.00, making a total amount of $1,893,928. That all of the amounts shown in this paragraph are chargeable against the properties of Old Colony Railroad Company, pursuant to Order No. 17 herein.

ELEVENTH: Upon information and belief: That a large part of the monies which have been used by the Trustees of the property of the Principal Debtor in the operation of the railroad of the Boston and Providence Railroad Corporation and in cash payments under the terms of the Boston and Providence lease, were earned by the 302
properties covered by the lien of the First and Refunding Mortgage of the Principal Debtor and, except for such use, would have been applied to the payment of expenses which constitute a lien ahead of said Mortgage and, as to any balance remaining, would have been applicable to the payment of interest on the obligations secured by said Mortgage. Petitioner alleges that the orderly administration of the Estate of the Principal Debtor requires that the funds to provide payments pursuant to the terms of the Boston and Providence lease should as a matter of equity be supplied by the holders of stock and the holders of obligations of the Old Colony 303
Railroad Company through the issuance of trustees' certificates or the issuance of securities having a lien on the properties of the Old Colony Railroad Company and should not be supplied from funds earned by the properties of the Principal Debtor covered by the lien of its First and Refunding Mortgage, which funds have in legal effect been impounded by petitioner.

TWELFTH: Upon information and belief: That, by virtue of the filing of its Petition for Order No. 7 herein and by virtue of Order No. 7 herein, petitioner has an equitable lien (in respect of the earnings of the properties of the

Principal Debtor which have been diverted for the purpose of operating the railroad of the Boston and Providence Railroad Corporation, the railroad of the Old Colony Railroad Company and the railroad of the Providence, Warren and Bristol Railroad Company and of making cash payments under the terms of the respective leases of said railroad companies), upon the properties of the Old Colony Railroad Company prior to any mortgage or other lien thereon, pursuant to Paragraph (2) of Order No. 17 herein, and in accordance with the principles ap-
305 plicable to equity receiverships of railroads such payments should now be deemed to be so charged. That petitioner and the holders of obligations secured by said First and Refunding Mortgage have already been damaged and prejudiced, and if further payment of the amounts of cash payable under the terms of the Boston and Providence lease is authorized, will continue to be damaged and prejudiced, in that (a) in effect, funds (upon which petitioner has a prior lien) applicable in part (1) to exonerate the property covered by said Mortgage from prior charges and (2) for interest on such obligations, have been and are being diverted and withheld
306 from the holders of such obligations and invested by the Trustees of the property of the Principal Debtor in prior lien charges of doubtful value on the property of the Old Colony Railroad Company to the detriment of such holders and (b) out of earnings of the Estate of the Principal Debtor realized largely from properties covered by the lien of its First and Refunding Mortgage, (1) the holders of Debentures of the Boston and Providence Railroad Corporation have been receiving and will, if cash payments under the terms of the Boston and Providence lease continue, receive 5% interest annually on said Debentures, and (2) the holders of the capital stock of Boston and Providence Railroad Corporation have been

receiving and will continue to receive, if such cash payments continue, $8.50 per share per annum on such capital stock, notwithstanding (i) the fact that the operation of the railroad of the Boston and Providence Railroad Corporation results in a loss of approximately $568,000 per annum before cash payments under said Boston and Providence lease and allocation of interest on equipment obligations and intra-system charges, and (ii) the fact that the holders of obligations secured by the First and Refunding Mortgage of the Principal Debtor have received only one-half of one interest payment since October 1, 1935. 308

THIRTEENTH: Petitioner alleges that the orderly administration of the Estate of the Principal Debtor in the interests of its secured creditors requires that its cash assets should not be depleted by further cash payments under the terms of the Boston and Providence lease.

WHEREFORE (without prejudice to the right of petitioner to file other petitions with respect to any of the matters herein contained), petitioner prays: 309

1. That paragraph 7 of Order No. 75 herein be amended and modified so as to read as follows:

"7. That, without limitation of any powers, authority, or direction herein given to the Trustees of The New York, New Haven and Hartford Railroad Company, they are hereby specifically directed to cease making any cash payments under the terms of the lease of the Boston and Providence Railroad Corporation, dated April 7, 1888; but the Trustees of The New York, New Haven and Hartford Railroad Company, either as such or as Trustees of Old Colony Railroad Company, shall not intentionally per-

mit or make any default in the performance of the terms of any other lease or executory contract to which Old Colony Railroad Company is a party, or in making all payments due in accordance with any other such lease or executory contract, unless and except upon the advice of and with the consent of this Court previously obtained upon petition and after hearing, notice of which hearing shall have been given to all interested parties (as the Court may direct) more than twenty days prior to such
311 hearing."

2. That the Court grant such other and further relief in the premises as petitioner may hereafter apply for and as the Court may deem just and equitable.

Dated, October 6, 1937.

BANKERS TRUST COMPANY, as Trustee,
By R. G. PAGE,
Vice-President.

WIGGINS & DANA,
Office and Post Office Address:
312 205 Church Street,
New Haven, Connecticut.

WHITE & CASE,
Office and Post Office Address:
14 Wall Street,
New York, New York,
Attorneys for Petitioner.

FREDERICK H. WIGGIN,
FITZHUGH MCGREW,
of Counsel.

(Verification omitted in printing.)

313

Order of Notice.

Upon reading the foregoing petition, it is ORDERED:

1. That the petitioner be and it hereby is directed to give notice of the filing thereof, by timely mailing of copies of said petition and of this order to all parties who have been permitted to intervene generally herein or to their attorneys and to all others who are customarily notified of hearings in these proceedings, on or before October 11, 1937.

2. That any party hereto or any party to whom notice as above ordered is given may file with the clerk of the court on or before October 21, 1937, an answer and statement of claim with respect to said petition. 314

3. That within five days after October 21, 1937, said petitioner shall provide and mail copies of such answers and statements of claim to all parties who have filed answers and statements of claim.

4. That within ten days after such mailing, the petitioner and any party who shall have filed an answer and statement of claim as aforesaid, may file with the clerk of this court a reply to any of such answers and statements of claim. 315

5. That within five days after the time limited herein for filing said replies said petitioner shall provide copies thereof to all parties who have filed an answer and statement of claim.

316

Order to Show Cause.

If any answer and statement of claim filed pursuant to Par. 2 of the above Order of Notice shall challenge or question the segregation of revenues and expenses referred to in Paragraphs Eight or Nine of the foregoing petition, as constituting a proper basis for the determination of the earnings of the property of the Old Colony Railroad Company or the property of the Boston and Providence Railroad Corporation, all parties receiving notice of the foregoing petition are hereby ordered to appear before this Court at New Haven on October
317 29, 1937, at 2:00 P. M., to show cause, if any they have, why this court should not forthwith refer the issues thus raised to the Interstate Commerce Commission for its recommendation as to the method or formula by which said segregation should be made, all pursuant to subdivision (c) (10) of Section 77 of the Bankruptcy Act as amended.

Dated, at New Haven this 7th day of October, 1937.

CARROLL C. HINCKS,
United States District Judge.

318

Extracts from Minutes of Hearing Held on December 6, 1937, at 10:30 A. M. on Informal Motion for Postponement of Hearing on Petition for Order No. 217. 319

[SAME TITLE]

Before: HONORABLE CARROLL C. HINCKS, District Judge.

Appearances:

For the Trustees of the Estate of the Principal Debtor 320
W. W. MEYER, ESQ.

For the Plan Committee of the Principal Debtor
CHARLES STOCKTON, ESQ.

For Bankers Trust Company, Trustee under the First and Refunding Mortgage of the Principal Debtor
COLONEL JOSEPH M. HARTFIELD,
FITZHUGH MCGREW, ESQ.,
STEWART H. JONES, ESQ.

For the Insurance Group 321
MALCOLM FOOSHEE, ESQ.

For Reconstruction Finance Corporation
LOUIS H. PORTER, JR., ESQ.

For Old Colony Railroad Company
O. M. SHAW, ESQ.

For Irving Trust Company, Trustee under the Collateral Trust Indenture of The New York, New Haven and Hartford Railroad Co.
H. C. MCCOLLOM, ESQ.

For Boston and Providence Railroad Corporation
BENTLEY W. WARREN, ESQ.,
DONALD C. STARR, ESQ.

For the Protective Committee of the Shareholders of Old Colony Railroad
R. A. CUTTER, ESQ.

THE COURT: Let me inquire if it is desired to proceed with hearing on Petition for 217?

323 COLONEL HARTFIELD: Your Honor, we discussed the matter, and we have come to the conclusion that it is the Trustee's duty to ask for the hearing. We are, of course, mindful of what your Honor said. We cannot as a practical matter adopt the usual practice of having a hearing on the merits because of delay in getting the report from the I. C. C., but we want to be practical in this situation and be constructive; so we thought, if it would be agreeable to your Honor, that we would like to submit to the attorneys who are really interested in this phase of the situation, a proposed order which would contemplate that
324 you would direct that if we satisfied you upon the hearing that we had made out a prima facie case, that the payments be withheld unless either the Old Colony gave some kind of undertaking satisfactory to your Honor that the payments would be returned in the event that the final judgment was in our favor, or, in the alternative, that the stockholders of the Boston and Providence would take such corporate action within such reasonable time as to the Court seemed proper, to give us a lien upon that line to the extent that any payments now made, directed to be made, or hereafter made, during the pendency of the proceeding, should be determined not to have been properly made from New Haven funds, so that, without

there now being made any order which would stop the payment absolutely so as to bring about the claimed termination of the Old Company's lease of the Boston and Providence, some protection could be offered to the bondholders, the refunding bondholders, while the matter was being determined by the Court.

The Trustee recognizes the position of the Court here, but it seems to it too serious a matter for it to assume that these payments ought to continue to be made, without presenting what it deems to be the facts which would justify the Court in giving it some provisional relief. 326

Your Honor, this morning, I think, forgot an item—I did not know about it—that immediately after these proceedings were instituted, and in November, 1935, the Trustee came here to ask for a segregation of these earnings so it could determine what course it should pursue. Everybody recognized that this segregation was a long, expensive thing, and I understand the cost of it was $100,000, and of course the Trustee was in no position to have had that done except on court authority.

In January, 1936, your Honor entered an order that you would not have a segregation made at that time and subsequently the Trustees commenced this work. In the 327 course of one month or two months, segregation would have disclosed nothing upon which the Trustee could have acted, because it would not have shown a full picture.

The year's study was not made until May, 1937, and it was not made available to the parties at interest until shortly before the hearings before the I. C. C., and in fact they were made available in September, 1937.

The Trustee feels that it has a duty here. It recognizes the seriousness of the situation, but we would like to have a hearing. If we send that proposed order to the parties at interest, it cannot be received until Thursday, and it has been suggested it would not be fair to ask them to come in for a hearing on Friday.

If it is convenient to your Honor and consistent with your other engagements, it would be entirely agreeable to us to have the hearing put off until some day next week, so as to give the parties at interest an opportunity to study that order.

We have been asked to state what we would expect to develop on a hearing, whether it is held on Friday or whatever day your Honor does fix for it.

We would expect to have the hearing that was orignally tentatively set for the 10th. We would expect the
329 other side to be able to present such proof as they thought necessary in connection with the so-called other relevant facts, and we would expect to put in evidence the segregation findings, the financial condition of the road, and the financial statements that have been prepared by the Trustees.

We certainly do not want to have the other parties incur any unnecessary expense, and we would be prepared to stipulate that any relevant testimony that was offered before the I. C. C. could be submitted to your Honor.

In other words, we would stipulate that the witnesses
330 sworn there, if produced here by the other side, would give the same testimony that was given there. We would do everything in our power to make the hearing as short and as inexpensive as possible. But it is a matter of serious import to the bonds, this payment of this $511,000 a year, in addition to the operating losses, and we feel that the Trustee requires a hearing before it acquiesces in any such payments, any such further payment.

HINCKS, J.: Mr. Shaw.

MR. SHAW: If your Honor please, I had supposed that the hearing originally set for the 10th was to consider only these other elements of value and we have addressed ourselves to the question whether it was practicable to do so. We feel very strongly it is not.

Now, as I understand it, Colonel Hartfield is suggesting something entirely different. He is suggesting, notwithstanding the fact that the Court has referred the segregation studies to the Commission, that he should be permitted on the 10th or at some later day next week to come in here and show a segregation study which the Court has felt it could not proceed upon without the Commission's recommendations, thus making a prima facie case and compelling us, as I see it, to go forward with all the evidence we can produce, somewhat in the dark, without knowing what the Commission will ultimately do. 332

It does strike me that it is now proposed that we accelerate a hearing which on October 29 I had thought was definitely to occur only after the Commission had reported to your Honor.

What I thought we were discussing this morning was whether we could make progress by going into other issues. The suggession now, it seems to me, is much broader.

HINCKS, J.: Isn't it a practical suggestion to try and agree on some method whereby any rental payments made pending a determination on the merits may be deemed to constitute a first lien upon the property of the Boston 333 and Providence, in the event that it shall eventually be found that the lease should be rejected?

MR. SHAW: Of course, your Honor, I cannot speak for the Boston and Providence. It seems to me that if Bankers Trust Company wishes to propose some such order, some method might be worked out whereby that could be tried on, so to speak, without going into the evidence which we feel very strongly we cannot do a complete job on until the Commission has spoken further.

HINCKS, J.: You say you cannot speak for the Boston and Providence, but I do recall that the Old Colony has taken the position that the Boston and Providence is one

of its most valuable assets. Would you, representing the Old Colony, be willing to subject what you consider a valuable asset to such a contingent lien?

MR. SHAW: I think, your Honor, that as a matter of law the Trustees of the New Haven have now a prior lien on all the properties of the Old Colony for any operating deficits or advances that are ultimately determined to have accrued, I think that lien goes only, insofar as the Boston and Providence is concerned, to our leasehold interest in the Boston and Providence. I understood the
335 question to be whether some method could be worked out by which a lien might be imposed upon the fee of the Boston and Providence property and as to that it does seem to me the Old Colony is quite powerless to take any effective action. That, it seems to me, is something that must be directed to the Boston and Providence. I see no method by which the Old Colony could subject the lessor's interest to any lien for the deficit, if any.

HINCKS, J.: I do not know that it is fair or advisable to ask the parties to make an unconsidered and extemporaneous expression of their views.

MR. WARREN: If your Honor please, as representing
336 the Boston and Providence, such an extraordinary suggestion as Colonel Hartfield made is a complete surprise, and I could not possibly speak for the Boston and Providence Railroad or its directors. It is a question, if they would care to consider it, that would have to be taken up at a meeting of its Board. This is Monday and the hearing is Friday. I could not possibly get a meeting of the Board of Directors before Friday. They have a regular meeting on next Tuesday, the 14th. I should be glad to lay before them any proposition that the representatives of Bankers Trust Company wish to submit.

I cannot, of course, say what their view would be. I do not know who could tell us. It is rather a surprise

proposition to me that they should be asked to subject their property to a lien for the benefit of the refunding bondholders if the rent is to be paid.

I do not know whether they would prefer to do that or if they would prefer to let nature take its course and have a default. Certainly they would be in a more independent position.

Not living at the New York end of the New Haven System, but the Boston end where I have known rather intimately the properties for a good many years, I cannot conceive of anybody who is both informed and acting in 338
good faith suggesting for a moment that not only what is the best asset of the Old Colony but—if by hook or by crook it could be retained to the New Haven—is the best asset of the New Haven, that that should be thrown into the sea with the expectation that they can fish it out at a lower rental than what they are now paying.

Of course, if the lease was cancelled the Boston and Providence would be free to make such arrangements as it might see fit. But that does not mean that I should not be entirely willing to submit the outline which Mr. Hartfield has been giving, confirmed by a written suggestion of what he wants, to my directors. I think that is 339
all that could be asked.

340 **Latter Part of Minutes of Hearing Held on December 22 and 23, 1937, on Petition for Order No. 217.**

[SAME TITLE]

Appearances:

For the Trustees of the Property of the Principal Debtor,
W. W. MEYER, ESQ.,
H. J. WELLS, ESQ.

341 *For the Plan Committee of the Principal Debtor,*
JOHN L. HALL, ESQ.,
JAMES GARFIELD, ESQ.

For Bankers Trust Company, Trustee,
COLONEL JOSEPH M. HARTFIELD,
FITZHUGH MCGREW, ESQ.,
STEWART H. JONES, ESQ.

For Reconstruction Finance Corporation,
LOUIS H. PORTER, JR., ESQ.,
A. MARVIN BRAVERMAN, JR., ESQ.

For Old Colony Railroad Company,
342 CHARLES B. RUGG, ESQ.,
O. M. SHAW, ESQ.

For Boston and Providence Railroad Corporation,
BENTLEY W. WARREN, ESQ.,
JOHN NOBLE, JR., ESQ.

For the Protective Committee of the Shareholders of Old Colony Railroad Company,
R. AMMI CUTTER, ESQ.

For the Mutual Savings Bank Group Committee,
MAJOR FRED N. OLIVER,
WILLARD P. SCOTT, ESQ.

(Note: The extensive record of fact made on the petition is omitted in printing.)

DECEMBER 23, 1937, 11:15 A. M.

(After recess.)

MR. BRAVERMAN: If your Honor please, the Reconstruction Finance Corporation has filed *no answer* in these proceedings, but is very vitally interested because it owns something like 16 to 17 per cent of the Old Colony Stock, it being the largest single block of stock. For that reason it feels that it should be heard in this matter. Insofar as the temporary matter goes, the Reconstruction Finance 344
Corporation rests its case and, therefore, makes a motion that the Petitioner's request be denied in this instance.

It does not appear that the answer that they have made in their reply to the answer of the Old Colony is substantiated. They say that the properties and funds on which the lien may be imposed are not sufficient or adequate to assure or guarantee that they will receive any money that has been paid out now in return. I do not think that they have now shown in any way that those properties are not adequate. All they have shown is that certain operating losses have been incurred. That is as far as they have gone so far. I think there are in 345
addition other elements that should be considered such as those to which Mr. Hall referred and those to which Mr. Dorigan testified. I, in consequence, make the motion.

HINCKS, J.: I understand, of course, that this motion is directed merely to the application for temporary relief?

MR. BRAVERMAN: Yes, that is correct.

HINCKS, J.: Do you want to be heard in reply, Colonel Hartfield?

COLONEL HARTFIELD: To that we would say that if you read carefully our reply you would see that we said we were entitled to this relief irrespective of whether or not we were unable to collect the monies from the Old

Colony. What we have shown without contradiction is that the Old Colony system has been operated continuously at a loss, and that, on the most favorable basis, assuming the operations to continue to December 31, 1938, there will be a loss of $15,000,000 and that the losses already incurred are in excess of $2,500,000. With that showing will anyone claim that a railroad that has continuously been operated for years at a loss and which has outstanding some $14,000,000 of indebtedness claimed against it, is of any real value? It is only a poet and
347 a dreamer who will say that we have not shown that the claim we have against the Old Colony will be an uncollectible claim, against a property which, not in an isolated period but in a period that covers over two years, and with conditions getting worse, has not earned any money, and is certainly not a property of value.

I want to call your Honor's attention further to a point I do not think I made plain this morning, that if it should happen that Old Colony got a claim against the New Haven under the plan, all they could get would be common stock. That common stock would not be available to us. It would be common stock that would go
348 into the treasury of the Old Colony and which would be available for all the creditors.

In other words, we do not believe, with the showing we have made of the actual operation of the Old Colony system, that anybody can urge seriously, "You are protected because you have a lien against the Old Colony which may be determined to be a lien upon property."

It is a lien upon property which cannot earn anything, has no rolling equipment, which cannot be operated, and which we believe will never be operated, except as part of the New Haven system. We believe eventually some fair plan will be worked out by which the Old Colony will be a part of the New Haven system. But to say that it

furnishes to these bondholders any protection, that we have failed to prove—when we have put in the actual amount of losses of the Old Colony and the actual amount of the bonded indebtedness—that we have failed to prove that this Petitioner's claim will not be collectible, is not understandable to me. It is simply because I do not believe the gentleman has read the exhibits which show these continuous losses of these properties, as well as having overlooked the statement of the bonded and other indebtedness of the Old Colony that was marked in evidence yesterday. 350

HINCKS, J.: You apparently overlooked the alternative ground of the motion which was stated merely by reference. I understood the motion to include the ground that, quite apart from the possibility of recovering any present payments of rent by enforcing a lien against the Old Colony at a later stage—quite apart from that consideration—the Bankers Trust Company on the record here has failed to include other relevant factors which must enter into any determination as to whether the court shall at the present time disturb existing relationships by ordering a default on the Boston and Providence lease. 351

COLONEL HARTFIELD: I did not understand that was part of his motion.

HINCKS, J.: He stated it merely by reference to what Mr. Hall had stated. Have I correctly surmised what you had in mind?

MR. BRAVERMAN: Yes, your Honor.

COLONEL HARTFIELD: It is our position that certainly the burden is not upon us to prove there are other factors which outweigh or make inapplicable the general rule that the court will not take funds that are being held by an officer of this court and use them for the benefit of the Old Colony here in keeping alive this Boston and

Providence lease because its existence they think will be more helpful to the Old Colony in getting better terms on a plan of reorganization; because that is what it gets down to, their claim that if this lease is not rejected the Old Colony will have something to contribute to the plan, namely, this Boston and Providence lease. Right in back of that is the position of the Boston and Providence, that they will say, "As long as these payments are kept up there is nothing for us to discuss in connection with the plan, as to finding reasonable terms on the plan. There
353 has been no default under our lease. This lease has been preserved. Why talk to us about making some reasonable contribution to this general picture of the plan."

It is that inequitable position that we are addressing ourselves to. I do not believe the burden is upon us to establish that it is because of the possible benefits to the Old Colony in having this Boston and Providence lease that we must go into that as part of our affirmative case.

HINCKS, J.: I feel on the whole that the pending application for temporary relief, insofar as it seeks an order which shall require the New Haven Trustees to withhold funds with which to make the payments pres-
354 ently due under the Boston and Providence lease, should be denied, and it is so ordered. The ground of this ruling is that the requested action would require a disturbance of the existing relationships; and the record of fact made in support of the application, even though it be assumed to be sufficient to show that the Boston and Providence is being operated at a loss, nevertheless fails to show that, all relevant factors considered, it is to the best interests of the New Haven Estate to withhold the payments in question.

After the exception which I assume is desired, I should like to make a few suggestions with respect to the situation which I hesitate to issue in binding form because the

matter is so complicated that I may not fully perceive all the implications of what I have it in mind to say. I will, however, ask the parties to consider if the procedure I have in mind might not be the most convenient and expeditious and logical procedure to bring the pending issues to a just and proper conclusion.

I do not see why the Trustees of the Old Colony cannot afford to let the time limit for action on the Boston and Providence lease lapse without taking any action. To be sure, that may preclude the Old Colony estate from rejecting the lease, but what of it? It will not bind the New 356
Haven estate. It will leave open the question as to whether it is to the best interest of the New Haven estate to provide the funds whereby the Boston and Providence lease can be kept in good standing. If the question at the threshold is dealt with in that way it would save the obvious conflict of interest under which the Trustees, acting in one capacity for the Old Colony and in the other for the New Haven, are confronted. If that action were taken we would be left with the single question as to what is to the best interests of the New Haven estate.

In order to get an intelligent, comprehensive decision on that question, let me suggest that the New Haven 357
Trustees prepare a complete agency account with the Old Colony up to December 31 of this year. They could either file it with the court and ask approval, which would be my preference, or if, for any reason that does not occur to me, that does not seem advisable, they could distribute it as a tentative statement to the parties interested so that they could begin to study and analyze it and prepare for the battle which I see cannot be avoided sooner or later.

Of course, at the present stage, in order to make such an account they have got to take some formula for segregation, and, until the commission and the court have

acted upon the reference that has been made, the only thing the Trustees could do would be to use the formula for the studies, the formula that was evolved in the studies. If later the court orders a modification of that formula it would be, I should think, a comparatively simple matter to substitute the modification into the agency accounts, and correct it to show the situation as it is under corrected and approved formula.

Now, if the agency account shows substantial balances due to the Old Colony, the Old Colony Trustees can use
359 them to pay rent to the Boston and Providence. If, on the other hand, it shows balances flowing the other way, then the question is clearly raised whether it is advisable from the standpoint of the New Haven Estate, notwithstanding those unfavorable balances, balances unfavorable to the Old Colony, to continue to furnish the funds to keep the Boston and Providence lease good.

That question may involve a number of factors. Mr. Dorigan in his testimony in this proceeding suggested a number of factors which might be considered. Of course, the Court cannot properly express itself now as to the relevance or the propriety of any one of those factors. I
360 do think, however, that the Trustees of the New Haven ought to begin at an early date to gather the necessary information to make a showing on any factor which may be considered relevant.

This Providence Terminal situation may require considerable study. If it is so that a default in the lease might throw into jeopardy the title of a large amount of property, I should suppose the Trustees of the New Haven would need careful advice as to the degree of hazard there involved. The bare possibility of a suit bearing on title does not mean very much. Knowing nothing about the underlying situation, it might involve nothing more than the nuisance value of a suit. It might, however, go much

deeper. It would seem to me that the item required careful appraisal.

All these relevant factors, it seems to me, the New Haven Trustees should study and be prepared to submit a complete agency account, and when the question of a segregation formula has been determined, be in readiness without further delays to file an amended answer to this Petition for Order 217 definitely recommending action one way or another to the Court; or perhaps, in addition to filing such an answer, they could file an independent petition for advice with a recommendation. It seems to 362
me that a recommendation from the Trustees is well nigh imperative, because the precise question is not, to be sure, whether the New Haven Trustees should reject the lease but rather whether they should provide funds for the Old Colony Trustees to keep it good. But it is essentially the same kind of a question, and that is a question that under the act, 77, and under the old principles of equity, is, I think, principally, in the first instance, a question for the Trustees. As I recall the wording of 77, it provides that the Trustees may reject. I think the underlying theory is that in all such questions, in addition to matters of fact, there is involved a large measure of business 363
judgment, the process of balancing one factor against another. And I think the duty is primarily on the Trustees to exercise that judgment. They are men of business, and whatever the Judge may be he is hardly that.

To be sure, the recommendation of the Trustees is not conclusive on the Court. It may be challenged, and the parties ought to have every opportunity to challenge any recommendation they may make. But, if the matter is decided without drawing on the Trustees for that deliberative and analytical process which the Court contemplates, it seems to me it has not received all the consideration that it should.

If the Trustees of the New Haven will prepare themselves to make a definite recommendation to the Court, so that, when the question of segregation is finally determined, they will have their minds made up on all the factors that they consider relevant, they can, as I say, either file an amended answer to this pending Petition or they can file an independent Petition of their own which could be brought on simultaneously with a hearing on 217 on its merits, and at that time we can assign the matter for final hearing and, I hope, get to rock bot-
365 tom, and, with due patience and indulgence, arrive at a just decision.

I do not know that it is in order for me to ask for comments on this line of procedure at the present time. I can leave the parties free to proceed as they deem best.

Then, of course, I make this further observation which is implicit in the procedure that I outline. If the New Haven Trustees file an agency account and ask the Court to hear it, due to the obvious conflict of interests, I would of course, take care to see that the interests of the Old Colony were represented by independent counsel. I think, since I see the Trustees have a representative here, I
366 will say now that I suggest that the New Haven Trustees, as soon as may be, shall file a complete agency account with the Old Colony for the operations during the period of administration in this Court up to December 31, and if any good reason occurs to them as to why they cannot do that or why they feel it inadvisable to do that, they can make their reasons known.

Now is there any thing more that needs attention at the present time? Do you want a formal order, Colonel? If so, you can submit it.

COLONEL HARTFIELD: We will do so, and I take it, your Honor, that your remarks indicate that it is without prejudice to our renewing the application in the event

of another payment coming due before the action is had on the merits of Order 217, and it is, of course, without prejudice to such action as the Trustees may take, or may be taken on behalf of the Trustees in connection with any attempt to disaffirm the Boston and Providence Lease. Your remarks clearly indicate that you did not intend, in denying our application for temporary relief, to determine the question at this time upon the merits.

We will submit a formal order simply denying the application.

HINCKS, J.: Very well. I think the application for 368
temporary relief was made orally anyhow.

COLONEL HARTFIELD: Yes, sir.

HINCKS, J.: I do not know why my oral order is not as good as your oral application. I am willing to put it in writing if you want it.

COLONEL HARTFIELD: I do not know that we will. I think your Honor's suggestion is right, that the record is proof of our having made the application just as well as the formal order will be, but I want to consider that further.

HINCKS, J.: There is one other item that I think I 369
ought to mention now, and that is the procedure of this reference to the Commission. I already indicated that I view that situation much like a reference to the master. When the Commission makes its recommendation to the Court, I suppose it is in order for any party who desires to take exceptions, and at the resulting hearing before the Court on the issue which was submitted to the Commission, the Court will be restricted to the record of fact which was before the Commission.

The parties have had an opportunity to make whatever record of fact before the Commission they want. When the Commission makes its recommendation on its own record, I do not think any party filing exceptions may at

370 *Report of Administration.*

that late stage ask the Court to enlarge the record to concern matters which were not before the Commission. I mention that in order that everyone interested may take pains to see that the original record before the Commission is complete. Insofar as that has application to Petition 217, that means merely that the record here on the question of segregation formula will be restricted to that matter before the Commission. The parties, of course, on 217, on other issues, would be entitled to enlarge the record of fact as they may see fit. (Pause.)

371 (Hearing closed at 11:57 A. M.)

CLERK PICKETT: It is stipulated by and between counsel that all exhibits in this record be returned to the respective counsel.

Report of Administration of Property of Old Colony Railroad Company and of Providence, Warren and Bristol Railroad Company up to and Including December 31, 1937.

372

[SAME TITLE]

(Filed April 19, 1938.)

Now come Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as the Trustees of the property of the Principal Debtor herein, and respectfully represent:

1. By paragraph 3, subparagraph (b) of Order No. 1 entered herein October 23, 1935, the Principal Debtor (hereinafter called the Debtor) was authorized to pay

such sums as might be necessary to comply with its obligations under contracts or leases, but said Order provided that such payments should not constitute affirmations of such contracts or leases or any of them. By paragraph 4 of said Order the Debtor was authorized, at any time prior to April 23, 1936, or prior to such other date as might be provided by further order of the Court, to reject any of its existing contracts or leases, and it was ordered that the performance by the Debtor of any such contract or lease within said period or future periods allowed for rejection thereof should not constitute or be 374
evidence of the adoption or assumption of such contract or lease by the Debtor or of the waiver by it of its right to reject the same. By subsequent orders the rights and powers granted to the Debtor by Order No. 1 were conferred upon the Trustees of its property with like force and effect as though said Trustees were therein specifically named in place of the Debtor.

2. Order No. 17, entered herein on November 30, 1935, amended Order No. 1 to provide, *inter alia*, that in case payments were made pursuant to the authority granted in paragraph 3, sub-paragraph (b) of said Order No. 1, 375
to comply with the obligations of the Debtor under leases, and such leases should be disaffirmed or rejected by the Debtor or such Trustees of its property as might thereafter qualify, or under a plan of reorganization, "the operation of the leased properties shall have been and said payments shall be deemed to have been made for the account of the lessors, and such payments shall be recovered, set-off, or made and charged, on the earnings and/or properties of the lessors prior to any mortgage or other lien thereon, by such method as the Court shall determine and further reserving all rights and equities of the parties arising from such payments."

3. By Order No. 56 the time within which leases of the Debtor might be rejected was extended to October 23, 1936.

4. On June 1, 1936, formal notice was given to Old Colony Railroad Company (hereinafter called Old Colony) of the rejection of the lease dated February 15, 1893, from Old Colony to the Debtor.

5. On June 3, 1936, Old Colony filed its petition (No.
377 74) for reorganization herein, reciting the terms of the aforesaid Orders No. 1 and No. 17 with respect to the operation of leased property and to payments made under any lease subsequent to October 23, 1935, alleging as follows:

"That the petitioner is entitled under the provisions of said lease to re-enter upon the demised premises and the same have and possess as of its former estate without prejudice to its right of action for arrears of rent or breach of covenant, but that the petitioner has no funds, no equipment and no organization
378 which would enable it to resume operation on a separate basis; that said re-entry is now impracticable and contrary to the public interest and would entail irreparable loss and damage to the petitioner and its security holders; that the petitioner could at best only accomplish a technical resumption of separate operation by agreement with said Trustees; that the petitioner's lines of railroad are already being operated by said Trustees pursuant to the orders of this Court; that said lines and those of the Debtor are now operated as integral parts of one railway system, and the problems of operation and administration of the property of the Debtor and that of

the petitioner are now so closely interrelated that the interests of the petitioner and its security holders will be best conserved by the continuance of unified operation by said Trustees under the supervision of this Court pending the reorganization of the Debtor or the further order of this Court; that the petitioner approves and agrees to such operation of its property by said Trustees for the petitioner's account until further notice."

and praying, *inter alia,* as follows: 380

"That the Trustees of the property of the Debtor herein be authorized and directed to continue until further order to operate the petitioner's property for the account of the petitioner * * *"

The Court by its Order No. 74, entered upon this petition, ordered the Trustees of the property of the Debtor to continue to possess and operate the property of Old Colony for its account.

By Order No. 75, the Court appointed Trustees of 381
the property of Old Colony, but directed the Trustees of the property of the Debtor to continue to possess and operate the properties of Old Colony, such operation to be for the account of Old Colony or the Trustees of its property. By said order the Trustees of the property of the Debtor were expressly authorized, in connection with their operation of the railroad lines and property of Old Colony as a part of the system of lines and properties theretofore operated by them, to mingle the funds, income, assets, equipment and other properties of Old Colony with the other property subject to their control, and, except as otherwise expressly authorized by the Court

and pending its further order, for the purposes of operation only, to deal with all the properties subject to their control as a single railroad system. Order No. 75 directed the Trustees of the property of the Debtor to preserve all such basic information, particularly with respect to the operation of the property of Old Colony and to the railroad system, as a whole, and to keep such records and accounts with respect thereto as would permit of such a segregation and allocation under the direction of the Court as the necessities of the case might from time to
383 time require, between the property of Old Colony and the remaining property under the administration of the Trustees of the property of the Debtor, including without limitation a segregation and allocation of revenues, income, expenses, property and equipment.

7. Order No. 75 contained provisions with respect to contracts and leases of Old Colony corresponding to the provisions of Orders No. 1 and No. 17 as set forth in paragraphs 1 and 2 herein.

8. By Order No. 116 herein the Court authorized and
384 directed the Trustees of the property of Old Colony to reject the lease dated December 1, 1891, from Providence, Warren and Bristol Railroad Company (hereinafter called the Bristol) to Old Colony. On February 11, 1937, formal notice was given to the Bristol of the rejection of said lease.

9. On February 12, 1937, the Bristol filed its petition (No. 138) for reorganization herein, reciting the terms of the aforesaid Orders No. 1; No. 17 and No. 75 with respect to the operation of leased property and to payments made under any lease subsequent to October 23, 1935, alleging as follows:

"That after default the petitioner is entitled under the provisions of said lease to re-enter upon the demised premises and the same have and possess as of its former estate without prejudice to its right of action for arrears of rent or breach of covenant, but that the petitioner has no funds, no equipment and no organization which would enable it to resume operation on a separate basis; that said re-entry is impracticable and contrary to the public interest and would entail irreparable loss and damage to the petitioner and its security holders; that the petitioner 386
could at best only accomplish a technical resumption of separate operation by agreement with said Trustees; that the petitioner's lines of railroad are being operated by said Trustees pursuant to the orders of this Court; that said lines and those of the Debtors herein are now operated as integral parts of one railway system, and the problems of operation and administration of the property of the Debtors and that of the petitioner are now so closely inter-related that the interests of the petitioner and its security holders will be best conserved by the continuance of unified operation by said Trustees under the super- 387
vision of this Court pending the reorganization of the Debtors herein or the further order of this Court; that the petitioner approves and agrees to such operation of its property by said Trustees for the petitioner's account until further notice,"

and praying, *inter alia*, as follows:

"That the Trustees of the property of the Principal Debtor herein be authorized and directed to continue until further order to operate the petitioner's property for the account of the petitioner
. . . ."

The Court by its Order No. 138, entered upon this petition, ordered the Trustees of the property of the Debtor to continue to possess and operate the property of the Bristol for its account.

10. By Order No. 150 the Court appointed Trustees of the property of the Bristol, but directed the Trustees of the property of the Debtor to continue to possess and operate the properties of the Bristol, such operation to be for the account of the Bristol or the Trustees of its property. By said order the Trustees of the property of
389 the Debtor were expressly authorized, in connection with their operation of the railroad lines and property of the Bristol as a part of the system of lines and properties theretofore operated by them, to mingle the funds, income, assets, equipment and other properties of the Bristol with the other property subject to their control, and, except as otherwise expressly authorized by the Court and pending its further order, for the purposes of operation only, to deal with all the properties subject to their control as a single railroad system. Said Order No. 150 directed the Trustees of the property of the Debtor to preserve all such basic information, particularly with
390 respect to the operation of the property of the Bristol and to the railroad system as a whole, and to keep such records and accounts with respect thereto as would permit of such a segregation and allocation under the direction of the Court as the necessities of the case might from time to time require, between the property of the Bristol and the remaining property under the administration of the Trustees of the Debtor, including without limitations a segregation and allocation of revenues, income, expenses, property and equipment.

11. The Debtor and the Trustees of its property have continued to operate the properties of the aforesaid sub

sidiary debtors for their account, as directed by the aforesaid orders, have made certain capital expenditures upon said properties, and have made certain tax and other payments as authorized by this Court, including payments under the leases from Boston and Providence Railroad Corporation to Old Colony, dated April 7, 1888, and from the Bristol to Old Colony, dated December 1, 1891.

12. Pursuant to the suggestion of the Court at the continued hearing on Petition for Order No. 217, on December 23, 1937, petitioners have prepared accounts of their 392
administration of the properties of said subsidiary debtors from October 23, 1935, up to and including December 31, 1937, which said accounts are hereto annexed, made a part hereof, and marked Exhibits 1 and 2, the former consisting of a Summary of Accounts covering Administration of the Property of Old Colony Railroad Company (with statements marked A, B and C attached) the latter consisting of a Summary of Accounts covering Administration of the Property of Providence, Warren & Bristol Railroad Company (with statement marked A attached). Said exhibits have been prepared from records and accounts prepared and kept by petitioners pursuant to or- 393
ders herein.

13. The charges stated in said accounts for sums paid to or for the account of Old Colony, prior to rejection of leases, for the expenditures for additions and betterments, and the net credits for property retired and not replaced are drawn from the current accounts of petitioners. The revenues and expenses of operation of the properties from June 1, 1936 to December 31, 1937, have been credited or charged, as the case may be, on the basis of the formula referred to the Interstate Commerce Commission by Order of Reference on Petition for Order No.

217, herein, and approved by the Commission's report and recommendation dated April 9, 1938. Expenses for the period prior to June 1, 1936, have been charged on the basis of said formula. Because of the time required and the expense to the estates of the several debtors that would be incurred in examining all waybills and passenger collections for the period prior to June 1, 1936, revenues for that period have been credited on the basis of tests and averages which petitioners believe reasonably approximate the result of applying the formula to rev-
395 enues for that period.

WHEREFORE, petitioners pray that the Court approve the accounts and order that the amounts stated therein constitute a charge on the earnings and/or properties of said subsidiary debtors prior to any mortgage or other lien thereon as expenses of administration and may be recovered out of the earnings and/or properties of Old Colony Railroad Company and Providence, Warren and Bristol Railroad Company by such method as the Court shall hereafter determine, said accounts to be subject to such adjustments as the Court may hereafter order.

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Dated: April 19, 1938.

H. S. PALMER,
JAMES LEE LOOMIS,
HENRY B. SAWYER,
Trustees.

(Verification omitted in printing.)

EXHIBIT 1.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, TRUSTEES.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

SUMMARY OF ACCOUNTS COVERING ADMINISTRATION OF THE PROPERTY OF OLD COLONY RAILROAD COMPANY.

	OLD COLONY	BOSTON & PROVIDENCE	PROVIDENCE, WARREN & BRISTOL	TOTAL
Payment Under Lease Obligations (Statement A)	$ 817,157	$1,178,000	$ 27,533	$2,022,690
Capital Expenditures (Net) (Statement B)	38,577	117,295	35	155,907
Total Expenditures	855,734	1,295,295	27,568	2,178,597
Operating Deficits ..... (Statement C)	4,419,179	1,896,981	96,098	6,412,258
Total including Operating Deficits	5,274,913	3,192,276	123,666	8,590,855
Charges for handling Company Coal and Interest on Investment in Equipment and Other Facilities not included in above Operating Deficits ..... (Statement C)	500,737	2,269,175	33,755	2,803,667
GRAND TOTAL	$5,775,650	$5,461,451	$157,421	$11,394,522

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Old Colony and Boston & Providence for period October 24, 1935 to December 31, 1937.

Providence, Warren & Bristol for period October 24, 1935 to June 3, 1936.

(Statements A, B and C omitted in printing)

New Haven, Conn.
April 13, 1938.

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EXHIBIT 2.

HOWARD S. PALMER, JAMES LEE LOOMIS, HENRY B. SAWYER, TRUSTEES.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

SUMMARY OF ACCOUNTS COVERING ADMINISTRATION OF THE PROPERTY OF PROVIDENCE, WARREN & BRISTOL RAILROAD COMPANY FOR THE PERIOD JUNE 4, 1936 TO DECEMBER 31, 1937.

PAYMENTS UNDER LEASE OBLIGATIONS:

DATE PAID	DETAIL	PERIOD COVERED	AMOUNT
June 29, 1936	Dividend on 1,500 shares Preferred and 7,246 shares Common @ 6%	7-135—12-31-35	$ 26,238.00

401 CAPITAL EXPENDITURES:

A. F. E. NO.	LOCATION	DESCRIPTION	GROSS EXPENSES	OPERATING EXPENSE LEDGER VALUE RETIREMENT	
30918	P. W. & B. Branch	1937 Rail Program	$ 5,876.13		5,876.13
Total Expenditures			.....	.....	32,114.13
Operating Deficits (Statement A)			.....	.....	277,086.45
Total including Operating Deficits			.....	.....	309,200.58
Charges for handling Company Coal and Interest on Investment in Equipment and Other Facilities not included in above Operating Deficits (Statement A)			.....	.....	85,314.64
GRAND TOTAL			.....	.....	$394,515.22

(*Statement A omitted in printing*)

402 New Haven, Conn.
April 14, 1938.

403

Petition of Boston and Providence Railroad Corporation for an Order Modifying Order No. 75 Herein.

(Filed April 29, 1938)

[SAME TITLE]

PETITION FOR ORDER No. 276.

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT:

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The petition of Boston and Providence Railroad Corporation respectfully shows:

1. This Court by paragraph 10 of Order No. 75 entered in the above entitled proceedings has reserved full right and jurisdiction to make from time to time such additional orders as the Court may deem proper as well as any orders amending, extending, limiting, modifying, or otherwise changing said Order No. 75.

2. By paragraph 7 of said Order No. 75 the Court has directed the Trustees of The New York, New Haven and Hartford Railroad Company, either as such or as Trustees of Old Colony Railroad Company, not intentionally to permit or make any default in the performance of any lease or executory contract to which said Old Colony Railroad Company is a party, or in making all payments due in accordance with any such lease or executory contract except upon the advice and with the consent of the Court previously obtained upon petition and after hearing.

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In compliance with said Order and with the provisions of Order No. 216 herein the Trustees have made all payments due in accordance with the provisions of the so-

called Boston and Providence lease from the Petitioner to Old Colony Railroad Company up to and including January 1, 1938, and by Order No. 267 of the Court the Trustees have been authorized to postpone the rental payment due April 1, 1938, under said lease during the grace period of thirty days therein stipulated. Negotiations are being conducted between the Trustees and the Petitioner for a modification of said lease, and to facilitate such negotiations the petitioner has agreed that in
407 the event that the rental due April 1, 1938, under the lease is not paid within the grace period provided in the lease, the Petitioner will not claim any right of re-entry or of forfeiture of the lease provided said rental is paid on or before June 1, 1938.

3. Paragraph 9 of said Order No. 75 provides that the performance of Old Colony Railroad Company or by the Trustees of its property of any contract or lease of Old Colony Railroad Company within such periods as may be allowed for the disaffirmance thereof shall not constitute or be evidence of the adoption of such contract
408 or lease by Old Colony Railroad Company or said Trustees, or the waiver by it or them of their right to disaffirm the same. In case such leases or contracts shall be subsequently affirmed and adopted by Old Colony Railroad Company or by its Trustees, payments made pursuant to the authority granted in said Order No. 75, or by the terms of any other Order in the proceedings, shall be deemed to have been made on account of the rental or other payments due from Old Colony Railroad Company under such leases or executory contracts.

Said paragraph 9 then provides as follows:

"In case such lease shall be disaffirmed or rejected by Old Colony Railroad Company or by the Trustees

of its property, or under a plan of reorganization, the operation of the leased properties shall have been and said payments shall be deemed to have been made for the account of the lessor, and such payment shall be recovered, set-off, or made and charged, on the earnings and properties of the lessor, prior to any mortgage or other lien thereon by such method as the Court shall determine, and further reserving all rights and equities of the parties arising from such payments." 410

4. The Petitioner is uncertain whether the reservation in said paragraph of all rights and equities of the parties arising from said payments qualifies or limits the preceding provisions relative to operation of leased properties by the Trustees and payments made to comply with the terms of such leases. The Petitioner submits that by virtue of circumstances arising from the operation of its properties by said Trustees under said Order No. 75, and from payments made to comply with the provisions of the lease of its property to Old Colony Railroad Company for the purpose of preventing any default in said 411
lease, and in view of the benefit to the several debtors' estates of the use and operation of the Petitioner's properties by said Trustees, the provisions of said paragraph 9 above quoted, if made applicable to the Petitioner and its properties in the event of a disaffirmance of said lease, would be manifestly inequitable to the Petitioner and would deprive it of rights and equities which said Order No. 75 expressly reserves. The Petitioner further submits that the provisions of paragraph 9 above quoted are not warranted by section 77 of chapter VIII of the Acts of Congress Relating to Bankruptcy as amended, and if enforced against the Petitioner or its properties in the

412 event of a disaffirmance would constitute a deprivation of the Petitioner's property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, the Petitioner prays:

1. That this Court, pursuant to the right and jurisdiction reserved by it by paragraph 10 of said Order No. 413 75, and to preserve the rights and equities of the Petitioner in the premises, enter an order modifying said Order No. 75 as follows:

a) By striking out therefrom the provisions of paragraph 9 thereof hereinabove quoted; and

b) By substituting in place thereof the following:

In case any such lease shall be disaffirmed or rejected by Old Colony Railroad Company or by the Trustees of its properties, or under a plan of reorganization, the Court reserves for future determination all questions arising out of any 414 such disaffirmance or rejection concerning rights and liabilities as between the parties to such lease for operation of the leased properties and for payments made pursuant to the terms of such lease, including without limiting the generality of the foregoing all questions as to the party for whom such operation and payments shall be deemed to have been made, the rights and liabilities as between the parties to account for such operation and payments, and the right of either party to recover, set-off, make or charge such payments on the earnings and properties of the other, and further reserving all rights and equi-

ties of the parties arising from such operation and payments.

2. That this Court grant the Petitioner such other and further relief as the Court may deem equitable and proper.

BOSTON & PROVIDENCE RAILROAD CORPORATION,
By [s] BENTLEY W. WARREN,
President.

April 29, 1938. 416

WARREN, GARFIELD, WHITESIDE & LAMSON,
30 State Street,
Boston, Massachusetts.

BENTLEY W. WARREN,
JOHN NOBLE, JR.,
of Counsel.

(Verification omitted in printing.)

417

Answer of Trustees to Petition for Order No. 217.

(Filed May 4, 1938.)

[SAME TITLE]

Now come Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as the Trustees of the property of the Principal Debtor (hereinafter called the Debtor), and of Old Colony Railroad Company (hereinafter called Old Colony), pursuant to the leave granted by the Court December 23, 1937, and for their answer to the Petition

for Order No. 217 of Bankers Trust Company and their report and recommendation thereon respectfully show:

1. Since the qualification of Trustees of the property of the Debtor your Trustees have given continuous attention to the question as to whether, in the interest of said Debtor's estate and of ultimate reorganization, any of the several leaseholds included in the railroad system of the Debtor should be rejected.

419 2. Upon a petition (No. 58) alleging that studies completed by them indicated that certain rental payments, prescribed by the provisions of the lease dated February 15, 1893, from Old Colony to the Debtor, were not being earned upon the demised property, and that, in the opinion of the Trustees, earnings sufficient to cover such payments could not reasonably be anticipated in the future, the Court authorized them to withhold the rental payment due March 31, 1936, and thereafter, pursuant to the discretionary authority granted them in Order No. 1 herein, they rejected said lease. Pursuant to such discretionary authority they rejected the lease dated February 4, 1890,
420 from Hartford and Connecticut Western Railroad Company to a predecessor of the Debtor.

They rejected said leases, although certain of the property included in the leaseholds was useful in the operation of the system of the Debtor, because in their judgment (a) the charges under such leases were unduly burdensome to said Debtor's estate, and (b) the continuance or assumption of such charges would adversely affect the rights and interests of the creditors of said Debtor.

3. Since the rejection of said lease from Old Colony and the qualification of Trustees of the property of said

Company, your Trustees have given like attention to the lease dated April 7, 1888, from Boston and Providence Railroad Corporation (hereinafter called the B. & P.) to Old Colony, and to the lease dated December 1, 1891, from Providence, Warren and Bristol Railroad Company (hereinafter called the P. W. & B.) to Old Colony. Upon the authority and at the direction of the Court, after notice and hearing, said P. W. & B. lease, for like reasons, was rejected. The Order authorizing and directing said rejection was entered without objection by any party at interest in this proceeding, upon a petition advising the 422
Court that your Trustees had caused studies to be made of the revenues and expenses of operating the line of the P. W. & B.; that such studies showed that no part of the sums payable to or for the account of that Company under the terms of said lease was being earned upon the demised property; that the expenses of operating said line substantially exceeded the revenues; and, that in their opinion earnings sufficient to cover the payments due under the terms of said lease could not reasonably be anticipated in the future.

4. Similar studies of the revenues and expenses of 423
operating the line of the B. & P. show that no part of the sums payable to or for the account of that corporation under the terms of said B. & P. lease is being earned upon the demised property. Said studies show that for the year ended December 31, 1936, no net income was derived from the operation of said line, but that said operation resulted in a net income deficit of $559,827.85, before taking into account the payments of sums payable under the terms of said lease to the lessor, and before taking into account any charges for (a) interest on investment in equipment of the Debtor used in the operation of the property, (b) interest on investment in facilities of others

used in such operation, and (c) charges for transportation of coal used in the operation of the property; that for the year ended December 31, 1937, such deficit amounted to $1,138,690.35. Your Trustees are of the opinion that earnings from the property of the B. & P. sufficient to cover the payments required under the terms of said B. & P. lease cannot reasonably be anticipated in the future.

5. Notwithstanding the results shown from month to
425 month by said studies, your Trustees, pursuant to the direction of the Court in Orders Nos. 74 and 75, recognizing that there are intangible values in the B. & P. leasehold as an integral part of the main line of railroad between New York and Boston, have continued to pay the rentals due from time to time under the terms of the B. & P. lease, believing that before reaching definite conclusions and making any representations to the Court, as to whether said lease is burdensome, they should have as further aid in arriving at their conclusions the benefit of earnings studies covering as long a period as was reasonably possible, should take such time as was required
426 for due consideration of factors other than the earning power of the property as shown by their studies, and should have, as well, the advice of the Court which they obtained on Petition for Order No. 221.

6. Their consideration of the earnings studies and of the other facts which they believe to be relevant have led your Trustees to the conclusions (1) that it is not in the interest of the estate of the Debtor to continue to advance funds for payment of sums due under the terms of the B. & P. lease; (2) that said lease is and will continue to be burdensome to the estate of Old Colony, in that the revenues derived and to be derived from operation of

the demised premises, even before taking into account the sums payable to or for the benefit of the lessor, fail by a wide margin to cover the expenses chargeable to such operation.

7. As shown by studies made by your Trustees for the year ended December 31, 1936, no net income was derived from operation of the properties of Old Colony, (excluding property of the B. & P. and of the P. W. & B.) but that said operation resulted in a net income deficit of $1,812,054.50, and for the year ended December 31, 1937, 428
such deficit was $2,336,444.69, all before taking into account the payments of sums payable under the terms of said lease to the lessor, and before taking into account any charges for (a) interest on investment in equipment of the Debtor used in the operation of the property, (b) interest on investment in facilities of others used in such operation, and (c) charges for transportation of coal used in the operation of the property. In the light of these figures and those in paragraph 4 herein your Trustees are unable to ascertain that the B. & P. lease has an intrinsic asset value to the estate of Old Colony which would justify continuance of the obligations of said lease. 429
They are of the opinion that such continuance would be contrary to the interests of the creditors of the estate of Old Colony.

8. Your Trustees are advised that the purpose of a proceeding under Section 77 is to modify or alter a debtor railroad's fixed charges, (which are defined in Section 77 as including rent for leased railroads), so that there shall be adequate coverage of such fixed charges by the probable earnings available for their payment, and, in the judgment of your Trustees, this principal should in fairness apply so far as possible to the various component

parts of a reorganized railroad, as well as to the whole, whether such parts be mortgage or leasehold estates.

9. Your Trustees are of the opinion, after due consideration of the probable prospective revenue to be derived, during the pendency of these proceedings and in the future, from the B. & P. leasehold, in the light of (a) changes in transportation conditions in the territory served by the railroad of the B. & P. since the lease was made, affecting the earning power of such railroad; (b) 431 its earnings experience since the inception of these proceedings; (c) the obligations of the lessee under said lease, and (d) other facts which they consider relevant, that the continuation of the payments due under the terms of said lease during the pendency of these proceedings and the assumption in any plan or plans of reorganization of the rental payments and other obligations of said lease, would not be fair and equitable to the parties affected by your Trustees' administration of the properties of the Debtor and of Old Colony, or to the parties affected by any reorganization of such properties.

432 10. The negotiations your Trustees have had looking toward a modification of the B. & P. lease have raised problems that, in their opinion, cannot be solved by modification of the lease. Your Trustees have advised the officers of the B. & P. accordingly. Your Trustees are of the opinion that it is not in the interest of the estate of the Debtor to continue to advance funds for the payment of sums due under said lease, and are of the opinion that, in the interest of the estate of Old Colony, there is no alternative to rejection of said lease.

WHEREFORE, your Trustees respectfully recommend that they be authorized and directed (a) to withhold any and

all payments due or to become due under the terms of the lease dated April 7, 1888, from Boston and Providence Railroad Corporation to Old Colony Railroad Company, and (b) to reject said lease.

Dated: May 3, 1938.

H. S. PALMER,
JAMES LEE LOOMIS,
HENRY B. SAWYER,
Trustees.

W. W. MEYER,
Counsel for Trustees. 434

(Verification omitted in printing.)

Order of Notice.

[SAME TITLE]

Upon reading the petition of Boston and Providence Railroad Corporation for an order modifying Order No. 75 herein, it is ORDERED: 435

1. That said petition is hereby set down for hearing in this Court at 10:30 o'clock, D. S. T., in the forenoon, or as soon thereafter as the Court can hear the same, on the 24th day of May, 1938, at New Haven, Connecticut.

2. That petitioner be and it hereby is directed to give notice of said hearing by timely mailing printed copies of said petition and this order to all parties who have been permitted to intervene generally herein, or to their attorneys, and to all others who are customarily notified of hearing in these proceedings.

ENTER:

Dated: May 6, 1938.

C. C. HINCKS,
District Judge.

436

Statement and Objections of Boston and Providence Railroad Corporation to Report of Administration, dated April 19, 1938, Herein Filed by the Trustees.

(Filed May 2, 1938.)

[SAME TITLE]

Now comes Boston and Providence Railroad Corporation, hereinafter referred to as the Boston and Providence, and respectfully submits its statement and objections to the Report of Administration of property of Old Colony Railroad Company dated April 19, 1938, and filed in these proceedings by the Trustees of the Principal Debtor herein:

437

I. On account of the short time of twelve days afforded parties in interest to examine the Trustees' Report of Administration and accounts, which accounts have been in preparation for the past four months, the Boston and Providence respectfully requests that it may be permitted hereafter to file such further objections thereto as it may deem advisable after it has had an opportunity to make a further study of said Report and accounts.

438

The Report of Administration purports to deal only with the administration of the property of the subsidiary debtors, Old Colony Railroad Company and Providence, Warren and Bristol Railroad Company. The Boston and Providence is not a party to the agency account stated between the Trustees of Old Colony Railroad Company and themselves as Trustees of The New York, New Haven and Hartford Railroad Company. The Report and accounts purport however to show payments under the lease from Boston and Providence Railroad Corporation to Old Colony Railroad Company, capital expendi-

tures made upon the properties of the Boston and Providence, operating deficits alleged to have been incurred upon its properties, and certain arbitrary intra-system charges against it, as items which should constitute a charge on the earnings and/or properties of Old Colony Railroad Company.

In submitting its objections to said Report and agency account the Boston and Providence does not thereby in any way admit that the theories, methods or formulae therein employed, the results thereby obtained, or the 440 items, accounts, claims or charges, or any of them, therein alleged to exist in favor of The New York, New Haven and Hartford Railroad Company against the Old Colony Railroad Company are applicable to or are or may become in any way binding upon the Boston and Providence on account of the operation of its properties by said Trustees, on account of rental payments which have been or may be made to comply with provisions of said Boston and Providence lease, or on account of capital expenditures by said Trustees upon its properties or for any other purpose, but expressly denies that the same are or may become applicable to or binding upon it. 441

The Boston and Providence herewith submits its objections to said Report and accounts, subject to the reservation hereinabove stated, and further reserving the right to object to and to be heard upon any report or account of operations of its properties by said Trustees which may hereafter be filed, whether or not such account shall be based in whole or in part upon the theories, methods and formulae employed in said agency account, or upon the results obtained therefrom.

II. The Boston and Providence objects to said Report of Administration and the accounts and statements annexed thereto, upon the following grounds:

Statement and Objections of Boston and Providence Railroad Corporation to Report of Administration.

1. That said Report and accounts, while purporting to have been prepared pursuant to the suggestion of the Court at the continued hearing on Petition for Order No. 217, do not constitute a true agency account as between Old Colony Railroad Company and the Trustees of The New York, New Haven and Hartford Railroad Company. The theory upon which these accounts has been prepared precludes the application of fundamental principles of accounting as between agent and principal. Consequently the accounts form no legal basis for claims as between the parties to said account and are not evidence of the balances, if any, due from either of said parties to the other as a result of the operation of Old Colony Railroad Company's properties by said Trustees.

2. That said Report and accounts in so far as they relate to revenues derived from and the expenses incurred in the operation of the properties of Old Colony Railroad Company, are based upon the results obtained from certain theories, methods, and formulae devised by members of the staff of said Trustees and applied in the so-called "Segregation of Earnings and Expenses of Leased and Mortgaged Lines," which theories, methods and formulae are manifestly inappropriate and inapplicable to an agency account designed to establish legal rights and liabilities as between the parties, and are inconsistent with the basic principles controliing the relationships between agents and principals and accounting as between them.

3. That said Report and accounts, in so far as they purport to allocate revenues to Old Colony Railroad Company for said operations, should but do not give

effect to the principles set forth in Section 15, subparagraph (6) of the Interstate Commerce Act as amended, governing the determination by the Interstate Commerce Commission in proceedings under said Section, of just, reasonable and equitable divisions of joint rates, fares and charges as between carrier parties thereto.

4. That said Report and accounts fail to take into consideration and give effect to the substantial benefits derived by other portions of the principal Debtor's system including contribution to system earnings, from operation of Old Colony Railroad Company's properties by said trustees as agents. 446

5. That said Report and accounts purport to impose upon Old Colony Railroad Company liability for interest on investment in and taxes on certain freight facilities in Boston arising out of the alleged use by the Boston and Providence of said facilities. The right to use said facilities, free from any obligation to pay rent or other compensation therefor, or to pay any portion of the taxes thereon, was granted in perpetuity to the Boston and Providence in the year 1904 by The New York, New Haven and Hartford, Old Colony, and New England Railroads. The right thus granted precludes the principal Debtor or the Trustees of its estate from making claim against the Old Colony or Boston and Providence for such alleged use, and said accounts should be adjusted accordingly. 447

6. That said Report and accounts purport to charge Old Colony Railroad Company for deficits alleged to have been incurred from the operation of its prop-

erties for the period, from October 25, 1935 up to the date of disaffirmance of the Old Colony lease on June 3, 1936, and for payments made during said period on account of capital expenditures and to comply with the provisions of the lease of Old Colony properties to the principal Debtor. Said accounts, to the extent that they purport to impose upon Old Colony said charges during this period, are inequitable and in disregard of established principles applicable to equity
449 receiverships of railroads.

Respectfully submitted,

BOSTON AND PROVIDENCE RAILROAD CORPORATION,
By WARREN, GARFIELD, WHITESIDE & LAMSON,
(s) BENTLEY W. WARREN,
Its Attorneys.

Dated, April 30, 1938.

WARREN, GARFIELD, WHITESIDE & LAMSON,
BENTLEY W. WARREN,
450 JOHN NOBLE, JR.,
30 State Street,
Boston, Massachusetts,
Attorneys for,
Boston & Providence Railroad Corporation.

451

Answer of Bankers Trust Company, as Trustee, to Petition dated April 29, 1938 (Petition for Order No. 276) of Boston and Providence Railroad Corporation for an Order Modifying Order No. 75 Herein.

(Filed May 25, 1938.)

[SAME TITLE]

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT:

452

Bankers Trust Company, as Trustee (herein called the "Mortgage Trustee") under the First and Refunding Mortgage dated December 9, 1920 and supplements thereto (herein called the "Mortgage") of The New York, New Haven and Hartford Railroad Company (herein called the "Debtor"), for its answer to the petition dated April 29, 1938 of Boston and Providence Railroad Corporation (entitled "Petition for Order No. 276") for an order modifying Order No. 75 herein:

453

1. Except as to only such allegations of such petition as are herein specifically admitted or denied, avers that it is without knowledge concerning the truth or accuracy of each and every allegation contained in said petition.

2. With respect to paragraph 1 of said petition, admits the allegations therein contained, but refers to Order No. 75 for more precise and complete information concerning the contents of said Order.

3. With respect to Paragraph 2 of said petition, admits the first sentence of said paragraph, but refers to Order No. 75 for more precise and complete information concerning the contents of said Order. Admits that, in compliance with said order and with the provisions of Order

No. 216 herein, "for the account of Old Colony Railroad Company and of the Trustees of its property," the Trustees of the Estate of the Debtor have made all payments due in accordance with the provisions of the so-called Boston and Providence lease from Petitioner to Old Colony Railroad Company up to and including January 1, 1938, and that by Order No. 267 of the Court, the Trustees of the Estate of the Debtor have been authorized to postpone the rental payment due April 1, 1938 under said lease during the grace period of thirty days therein
455 stipulated; but refers to said Order No. 216 and to said Order No. 267 for information concerning the terms and provisions thereof, respectively. Admits that Petitioner has agreed that in the event that the rental due April 1, 1938, under the lease is not paid within the grace period provided in the lease, Petitioner will not claim any right of re-entry or of forefeiture of the lease, provided said rental is paid on or before June 1, 1938.

4. With respect to Paragraph 3 of said petition, admits the allegations thereof, but refers to Order No. 75 for more precise and complete information concerning the
456 contents of said Order.

5. With respect to Paragraph 4 of said petition admits that Petitioner is uncertain as therein alleged. Admits that the views of Petitioner are as alleged in said paragraph.

Upon information and belief:

Denies that the reservation in Paragraph 9 of Order No. 75 of all rights and equities of the parties arising from said payments qualifies or limits the preceding provisions relative to operation of leased properties by the Trustees of the property of Old Colony Railroad Com-

pany and payments made to comply with the terms of such leases. Denies each and every remaining allegation of said paragraph.

FURTHER ANSWERING SAID PETITION, THE MORTGAGE TRUSTEE ALLEGES:

6. By the Mortgage, the Debtor granted, bargained, sold, released, conveyed, assigned, transferred, pledged and set over to the Mortgage Trustee the properties therein described, subject as therein set forth (Granting Clauses, pages 14 to 31). 458

7. Section 1 of Article Eight (Page 94) of the Mortgage provides that until some default shall have been made under the Mortgage and shall have continued as therein stated, or until other events shall have happened as therein set forth, the Railroad Company (the Debtor herein) shall be suffered and permitted to retain possession of all the mortgaged property; to manage, operate and use the same; and to "collect, receive, use and enjoy in any manner not inconsistent with the provisions hereof, the tolls, earnings, income, rents, issues and profits thereof." 459

8. Default has been made under the Mortgage in the respect set forth in the petition verified November 4, 1935 of the Mortgage Trustee for leave to intervene herein (Petition for Order No. 6), and said default still continues. By reason of such default the Mortgage Trustee was, upon the happening thereof, and is entitled to exercise the rights and remedies specified in Article Seventh (Pages 77 to 93) of the Mortgage as exercisable upon the happening of a default.

9. On or about November 4, 1935, the Mortgage Trustee filed herein its Petition for Order No. 7 entitled

"Petition of Bankers Trust Company, as Trustee, for Segregation Order" (R. Page 47). In said petition, the Mortgage Trustee demanded that "all tolls, earnings, revenue, rents, issues, profits and other income derived from operation of properties covered by the lien of the Mortgage and the Third Supplement thereto, and all other income covered by the lien of the mortgage, be segregated, sequestered and impounded" for the benefit of the Mortgage Trustee and the holders of Bonds and pre-existing obligations secured by the lien of the Mort-
461 gage and the Third Supplement thereto (R. Page 51). On or about January 17, 1936, this Court entered herein its Order (Nos. 7, 18 and 29) entitled "Order upon Petitions for Segregation of Earnings" wherein, among other things, it was ordered, adjudged and decreed that no trustee of a mortgage covering property included in the Railroad System of the Debtor should be required to make any further demand or application for the enforcement in this proceeding of any lien or right in respect of any of the tolls, earnings, incomes, rents, issues and profits of the property covered by the mortgage, and that the rights of each mortgage trustee should be determined
462 as if due demand or application had been made by such mortgage trustee at the earliest date or dates when any such mortgage trustee would have been entitled to make such demand or application under the terms of the mortgage of which it is trustee, or as a matter of law (R. Page 315).

10. Upon information and belief:

Regardless of the aforesaid order entitled "Order upon Petitions for Segregation of Earnings" and irrespective of the provisions of said order, the demand of the Mortgage Trustee embodied in its aforesaid petition entitled "Petition of Bankers Trust Company, as Trus-

tee, for Segregation Order" was effective and sufficient, as a matter of law, to impound for the Mortgage Trustee and the holders of Bonds and pre-existing obligations secured thereby all income derived from the property covered by the lien of the Mortgage or derived from the operation thereof; and all such income earned subsequent to the date of filing said petition (Petition for Order No. 7) was and is covered by the lien of the Mortgage, subject only to payment of necessary expenses incurred and to be incurred in the operation of the property covered by the lien of the Mortgage. The properties of Boston and 464
Providence Railroad Corporation are not covered by the lien of the Mortgage except by virtue of subrogation, as hereinafter alleged. Sums paid or payable in respect of the lease from Boston and Providence Railroad Corporation to Old Colony Railroad Company do not constitute an operating expense of the Trustees of the Estate of the Debtor, and are not payable out of or chargeable against such income.

11. On June 2, 1936 (R. Page 721), the Trustees of the Estate of the Debtor disaffirmed the lease from Old Colony Railroad Company to the Debtor. Therefore, 465
since October 23, 1935, operation of the properties of Old Colony Railroad Company (including the properties leased by Old Colony Railroad Company from Boston and Providence Railroad Corporation) by the Trustees of the Estate of the Debtor has been, and is, for the account and at the risk of Old Colony Railroad Company, or the Trustees of its estate.

12. Upon information and belief:

Such disaffirmance necessarily involved and included the disaffirmance and rejection by said Trustees of all obligations in respect of the lease from Boston and Providence Railroad Corporation to Old Colony Railroad Com-

pany, or in respect of the properties described in or covered by said lease. In regard to said lease, there exists on the part of the Trustees of the Estate of the Debtor neither privity of contract nor privity of estate with Boston and Providence Railroad Corporation; and funds from whatever source derived which, upon a proper allocation, are allocable to the Mortgage Trustee for the benefit of the holders of obligations secured by the Mortgage and which are covered by the lien of the Mortgage, may not lawfully be expended upon or in respect
467 of properties not covered by the lien of the Mortgage, unless not only is the reimbursement thereof, with interest, to the Mortgage Trustee secured by a senior lien and charge upon the properties, and income therefrom, upon or in respect of which any sums are so expended, but also such senior lien and charge are adequate and sufficient to assure and guarantee such reimbursement to the Mortgage Trustee. The properties and funds upon which a senior lien and charge may be imposed to secure the reimbursement to the Mortgage Trustee of expenditures made subsequent to June 2, 1936 (the date on which the original petition of Old Colony Railroad Company was
468 filed for relief in this proceeding) in respect of the lease of Boston and Providence Railroad Corporation or the properties described therein or covered thereby are not sufficient or adequate to assure or guarantee such reimbursement to the Mortgage Trustee, unless such senior lien and charge are imposed upon the properties of Boston and Providence Railroad Corporation described in or covered by said lease and the income, if any, heretofore or hereafter derived from the operation of such properties.

13. Upon information and belief.

All payments heretofore made by the Trustees of the Estate of the Debtor in respect of the lease from Boston

and Providence Railroad Corporation to Old Colony Railroad Company have been made "for the account of Old Colony Railroad Company and of the Trustees of its property," and have not been made by the Trustees of the Estate of the Debtor for their own account, or for the account of the Debtor or the Mortgage Trustee. Part or all of the payments received by Boston and Providence Railroad Corporation were made out of funds impounded by the Mortgage Trustee.

14. Upon information and belief, as a matter of law: 470

In case the Trustees of the Estate of Old Colony Railroad Company should disaffirm the lease from Boston and Providence Railroad Corporation operation by such Trustees of the properties described in or covered by such lease subsequent to June 2, 1936, (the date on which the original petition of Old Colony Railroad Company was filed for relief in this proceeding) will have been for the account and at the risk of Boston and Providence Railroad Corporation; unless otherwise repaid to the Trustees of the Estate of Old Colony Railroad Company all deficits, if any, resulting from such operation by such Trustees will be chargeable against the properties of 471 Boston and Providence Railroad Corporation described in or covered by said lease as a first and paramount lien thereon to secure such repayment; and all payments made by such Trustees to Boston and Providence Railroad Corporation may be recovered, set-off, or made and charged, on the earnings and properties of Boston and Providence Railroad Corporation, prior to any mortgage or other lien thereon.

15. Upon information and belief, as a matter of law:

The right so existing in the Trustees of the Estate of Old Colony Railroad Company to recover, set-off, make

or charge on the earnings and properties of Boston and Providence Railroad Corporation all payments made by such Trustees is a right to which, by reason of the payments made by the Trustees of the Estate of the Debtor "for account of Old Colony Railroad Company and of the Trustees of its property," and by reason of the operations conducted by the Trustees of the Estate of the Debtor for account of the Trustees of the Estate of Old Colony Railroad Company, the Trustees of the Estate of the Debtor are entitled to be subrogated, and to which
473 the Mortgage Trustee is entitled to be subrogated if and to the extent that any payments made by the Trustees of the Estate of the Debtor to Boston and Providence Railroad Corporation have been or shall be made out of funds impounded by the Mortgage Trustee. Paragraph 9 of Order 75 accords to the Trustees of the Estate of Old Colony Railroad Company the legal right to which such Trustees are entitled, and such right is a right to which the Trustees of the Estate of the Debtor and the Mortgage Trustee are severally entitled to be subrogated. Denial of such right or denial of subrogation thereto would constitute a violation of the Fifth Amendment to
474 the Constitution of the United States of America, upon the protection of which the Mortgage Trustee relies.

16. As appears from its Petition for Order No. 276, Boston and Providence Railroad Corporation has had knowledge of the terms and provisions of Order No. 75 and of Order No. 216, and has also had knowledge of the possibility that its lease to Old Colony Railroad Company might be disaffirmed. Yet, notwithstanding such knowledge, at no time has Boston and Providence Railroad Corporation refused to accept the payments which have been made, or sought to compel an election by the Trustees of the Estate of Old Colony Railroad Company to

affirm or disaffirm the lease, or sought to recover possession of its property. Instead, Boston and Providence Railroad Corporation has acquiesced in the operation of its properties by the Trustees of the Estate of Old Colony Railroad Company, or by the Trustees of the Estate of the Debtor for account of the Old Colony Trustees. Upon information and belief, Boston and Providence Railroad Corporation does not possess and has not since June 2, 1936, possessed the organization and facilities necessary for the operation by it of its properties.

476

WHEREFORE, the Mortgage Trustee respectfully prays that the petition be dismissed.

Dated, May 19, 1938.

BANKERS TRUST COMPANY, AS TRUSTEE,
By R. G. PAGE,
Vice-President.

ATTEST:
G. H. HAYES
Assistant Secretary.

(SEAL)

477

WIGGIN & DANA,
205 Church Street,
New Haven, Connecticut.

WHITE & CASE,
14 Wall Street,
New York City.
Its Attorneys.

FREDERICK H. WIGGIN,
FITZHUGH MCGREW,
JESSE E. WAID,
Of Counsel.

(Verification omitted in printing.)

478 **Answer of Protective Committee of the Shareholders of Old Colony Railroad Company to Petition for Order No. 276.**

(Filed May 25, 1938.)

[SAME TITLE]

Now comes the above named Protective Committee and for answer to the above petition says:

479 1. The Protective Committee admits the material allegations of paragraphs 1, 2 and 3 of the petition, except that it says that insofar as the said petition purports to state the substance of various orders entered in the above proceedings, the said orders are the best evidence of their contents and import.

2. The Protective Committee is ignorant as to the truth of the facts, if any, asserted in paragraph 4 of the petition and leaves the petitioner to prove the same.

And Further Answering

480 3. The Protective Committee alleges upon information and belief that Boston and Providence Railroad Corporation has intervened generally in these proceedings, that on or about April 30, 1936, said corporation filed a proof of claim against the principal debtor, so-called, in the above entitled proceedings; that since that date and probably for a considerable period prior thereto said corporation through its president and general counsel has had or received actual notice and knowledge of these proceedings and of the orders entered therein at least as rapidly as the same have been printed and distributed to parties or to other persons interested or requesting notice,

including (without limitation) the provisions of order number 75; and that said corporation has at least since April 30, 1936, accepted or received the benefit of all payments of rent and other payments made during the pendency of these proceedings under its lease dated April 7, 1888, to Old Colony Railroad Company with full knowledge of the provisions of said Order No. 75, and of all other orders entered herein not only without objecting to the provisions of said orders but acquiescing therein.

Wherefore the Protective Committee says that it would be inequitable to grant the prayers of said petition for Order No. 276 and prays that the same be denied and for such other and further relief as to this Honorable Court may seem equitable and proper.

PROTECTIVE COMMITTEE OF THE SHAREHOLDERS
OF OLD COLONY RAILROAD COMPANY

By its Solicitors
PALMER DODGE BARSTOW WILKINS & DAVIS

By R. A. CUTTER,
53 State Street, Boston, Massachusetts.

May 21, 1938.

484

Extract from Minutes of Hearing Held on May 24, 1938, at 11 A. M., D. S. T., on the Following Matters:

(1) Hearing on Segregation Formula.
(2) Trustees' Account of the Operations of Old Colony System and P. W. & B.
(3) Final Hearing on Petition for Order No. 217.
(4) Petition of Boston & Providence Railroad Corporation for a Modification of Order No. 75.

[SAME TITLE]

485

Before: Honorable Carroll C. Hincks, District Judge.

Appearances:

For the Trustees of the Estate of the Principal Debtor
W. W. Meyer, Esq.
H. J. Wells, Esq.

For the Plan Committee of the Principal Debtor
John L. Hall, Esq.
James Garfield, Esq.

486

For Bankers Trust Company, Trustee Under the First and Refunding Mortgage of the Principal Debtor
White & Case, Esquires
by Colonel Joseph M. Hartfield and
J. E. Waid, Esq., of Counsel.

For Reconstruction Finance Corporation
Louis H. Porter, Jr., Esq.
A. Marvin Braverman, Jr., Esq.

For Old Colony Railroad Company
CHARLES B. RUGG, ESQ.
OSCAR M. SHAW, ESQ.

For Boston and Providence Railroad Corporation, on all Matters Set Down for Hearing
BENTLEY W. WARREN, ESQ.
JOHN NOBLE, JR., ESQ.

For the Protective Committee of the Shareholders of Old Colony Railroad, in Connection with Petition 217 488
ROBERT G. DODGE, ESQ.
R. AMMI CUTTER, ESQ.

For the Mutual Savings Bank Group Committee
MAJOR FRED N. OLIVER,
WILLARD P. SCOTT, ESQ.

For the Insurance Group
EDWIN S. S. SUNDERLAND, ESQ.
MALCOLM FOOSHEE, ESQ.
EDWARD M. DAY, ESQ.

For the Old Colony Trustees, on the Accounting Matter 489
ROBERT G. DODGE, ESQ.
OSCAR M. SHAW, ESQ.

For Irving Trust Company, as Trustee Under Collateral Trust Indenture of the Principal Debtor
H. C. MCCOLLOM, ESQ.
H. A. HEERWAGEN, ESQ.

For Bank of New York and Trust Company, Trustee of the New England Mortgage
STUART N. SCOTT, ESQ.

490 **Order Confirming and Accepting Report of the Interstate Commerce Commission (Finance Docket No. 10992) Made April 9, 1938, on Segregation of System Earnings and Expenses.**

[SAME TITLE]

ORDER No. 283.

These proceedings having come on further duly to be
491 heard on May 24, 1938, upon the petition of Bankers Trust Company, as Trustee, verified October 6, 1937 (Petition for Order No. 217) (Printed Record, 3263); and no exceptions having been filed to the findings and recommendation of the Interstate Commerce Commission embodied in its Report dated April 9, 1938, and filed with this Court April 15, 1938 (Printed Record, 4241); and all parties having been heard or given opportunity to be heard; NOW, after due deliberation the Court, being fully advised in the premises, hereby:

FINDS, ORDERS, ADJUDGES AND DECREES:

492

That the findings and recommendation of the Interstate Commerce Commission embodied in its Report dated April 9, 1938, and filed with this Court April 15, 1938 (Printed Record, 4241) be and they hereby are confirmed and accepted.

ENTER:

CARROLL C. HINCKS,
District Judge.

Dated: May 25, 1938.

493

Bankers Trust Company Exhibit No. 6, Four Letters, Introduced at Hearing on May 24-25, 1938.

(Letterhead of)

WARREN, GARFIELD, WHITESIDE & LAMSON
COUNSELLORS AT LAW
30 STATE STREET
BOSTON, MASS.

April 30, 1936

494

W. W. Meyer, Esq., General Counsel
New York, New Haven & Hartford Railroad Company
New Haven, Connecticut

Dear Sir:

I am writing on behalf of Mr. Bentley W. Warren, who has filed claims in the reorganization of the New Haven on behalf of Springfield Railway Companies-1926, New England Investment and Security Company-1927, and Boston and Providence Railroad Corporation. We should like very much to obtain a complete series of all the printed petitions and orders in the reorganization pro- 495
ceedings, and would appreciate being sent either the copies or information as to where the same may be obtained.

Mr. Warren would also like, of course, to receive notice of all further proceedings in the reorganization.

Very truly yours,

/s/ DONALD C. STARR

DCS:RFD

496 *Bankers Trust Company Exhibit No. 6.*

May 4, 1936.

Donald C. Starr, Esq.,
care Warren, Garfield, Whiteside and Lamson,
30 State Street,
Boston, Massachusetts.

Dear Mr. Starr:

This will acknowledge your letter of April 30. I have mailed Mr. Warren the printed record to date in this
497 Company's Section 77 proceeding, and shall be pleased to place his name on the mailing list to receive copies of the printed record in the future.

Very truly yours,

/s/ W. W. Meyer
General Counsel.

(Letterhead of)

498 Warren, Garfield, Whiteside & Lamson
Counsellors at Law
30 State Street
Boston, Mass.

May 7, 1936

W. W. Meyer, Esquire, General Counsel
The New York, New Haven & Hartford R. R. Co.
New Haven, Conn.

Dear Mr. Meyer:

I duly received the printed copies of petitions, orders, etc., through No. 58, which you kindly sent me and for

which I am very much obliged. If it is possible and not too inconvenient, I shall, of course, appreciate copies of subsequent papers in view of my representation of the Springfield Railway Companies, New England Investment and Security Company, and the Boston and Providence Railroad. I especially want to keep in touch with what goes on in these proceedings because of the somewhat complicated relations of the Boston and Providence Railroad with the Old Colony and the New Haven Companies.

Yours very truly, 500

/s/ BENTLEY W. WARREN

BWW:L

May 9, 1936.

Bentley W. Warren, Esq.,
30 State Street,
Boston, Massachusetts.

Dear Mr. Warren:

Reference is made to your letter of May 7, acknowledging receipt of the printed copies of the record in the New Haven reorganization proceeding. 501

We have placed your name on the mailing list to receive copies of the printed record in the future beginning with No. 59.

Very truly yours,

/s/ W. W. MEYER
General Counsel.

502

Order Further Modifying Order No. 75.

[SAME TITLE]

ORDER No. 284.

Upon oral motion in open Court of counsel for the Trustees of the property of the Principal Debtor and of Old Colony Railroad Company at hearing May 25, 1938, on Petition for Order No. 217, and not opposed, and
503 Boston and Providence Railroad Corporation having consented to claim no right of re-entry or forfeiture prior to July 1, 1938, for delay in the payment due April 1, 1938, under its lease to Old Colony Railroad Company, it is ORDERED:

That paragraph 7 of Order No. 75 as heretofore modified be and it hereby is further modified to permit said Trustees to postpone the payment due April 1, 1938, under the lease of Boston and Providence Railroad Corporation to Old Colony Railroad Company, dated April 7, 1888, until July 1, 1938, provided, however, that said Trustees
504 shall make said payment on or before said date unless prior thereto this Court shall order otherwise on the Petition for Order No. 217 herein or the answer of said Trustees to said petition.

ENTER:

C. C. HINCKS,
District Judge.

Dated: May 31st, 1938.

505

Memorandum of Decision on Petition for Order No. 217 and the Trustees' Answer Thereto.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF CONNECTICUT.

In Proceedings for the Reorganization of a Railroad.

No. 16,562.

506

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

On October 23, 1935, the New Haven (N H) filed its 507
petition for reorganization herein and trustees were duly appointed upon its estate. On June 1, 1936, the N H trustees rejected the Old Colony (O C) lease. On June 2, 1936, O C filed its petition with this court for reorganization as a secondary debtor, which petition on June 3, 1936, was duly approved by this court and the persons previously appointed N H trustees were appointed trustees of the estate of O C, said order (No. 75) providing, however, that the O C trustees might disaffirm any of its existing leases, "but only with the advice and consent of this court previously obtained upon petition and after hearing, notice of which shall have been given to all interested

parties more than twenty days prior thereto." Thereafter, the Providence, Warren and Bristol (P W B) lease was rejected. Thereupon P W B filed with this court its petition for reorganization as a secondary debtor in these proceedings, and the same persons were appointed trustees also for its estate.

On October 7th, 1937, Bankers Trust Company as trustee under the First and Refunding Mortgage of the principal debtor filed its petition for Order No. 217, pray-
509 ing that the N H trustees be "specifically directed to cease making any cash payments on the terms of the lease of the Boston and Providence Railroad Corporation" (B P). Upon this petition a show cause order issued pursuant to which the parties filed answers and replies, and the petition came on for hearing on December 23, 1937. Having heard the parties, I felt that the record then made was insufficient to justify even temporary relief and suggested that the N H trustees file an accounting of their operation of O C properties up to December 31, 1937, and, upon the filing of a report from the Interstate Commerce Commission as to a proper segregation formula, be in
510 readiness to file an amended answer to petition for Order No. 217 with their recommendation in the premises. An interlocutory order accordingly was entered.

Thereafter, on April 15, 1938, the Interstate Commerce Commission filed with the court its findings and recommendations concerning the segregation formula, an account of which is contained in my memorandum of even date upon the trustees' accounting. The N H trustees on April 19, 1938, filed a report of their administration of the O C properties up to and including December 31, 1937. On April 28, 1938, the court ordered the N H trustees to file their answer to petition for Order No. 217 containing their recommendations concerning the B P lease. In ac-

cordance with this order the trustees on May 3, 1938, filed their answer recommending as trustees of the N H that all payments due under the B P lease should be withheld and recommending as trustees of the O C that the B P lease be rejected. After replies had been filed to the trustees' answer, the matter came on for hearing before the court on May 24th and 25th, at which time without opposition the court approved the findings and recommendations of the Interstate Commerce Commission concerning the segregation formula, and entered its order ac- 512
cordingly. The record of fact upon petition for Order No. 217 was closed. Oral arguments were had which have since been supplemented by brief and the matter is now before the court for decision.

At the hearing the O C Railroad Company, debtor, was represented by the firm of Ropes, Gray, Boyden and Perkins, and the Protective Committee of the Shareholders of O C Railroad was represented by Messrs. Dodge and Cutter of the firm of Palmer, Dodge, Barstow, Wilkins and Davis. B P was represented by Messrs. Warren and Noble, the former now serving as president of the B P Corporation. The N H trustees were represented by 513
their General Counsel and counsel also appeared for the Plan Committee of the principal debtor and for numerous creditors, groups of creditors and mortgage trustees.

At the hearing O C Railroad Company and O C Shareholders Protective Committee, and O C Trust Company, Trustee under the O C mortgage, all withdrew their opposition to the prayer of petition for Order No. 217, agreeing that "further payment by the New Haven trustees would not be prudent and wise * * * that it would not be a provident exercise of their duties as trustees." This view seems to have been shared by all the creditors represented, excepting only B P itself.

The accounting of the N H trustees shows for the accounting period of about twenty-six months a loss of $5,775,650. charged against B P operation.

The accounting of the trustees has been approved by my memorandum of even date. The proof of loss resulting from B P operation imperatively requires the conclusion that the B P lease is burdensome to the O C estate.

Notwithstanding the inevitability of this conclusion, the O C interests still urge that the lease should not now
515 be rejected. They filed no written brief in support of this contention—except for a reply brief by the O C Protective Committee. I therefore look to the transcript of the oral arguments for their statement of position. There I find the following contentions.

It was stated in the course of argument that the O C directors "have come to the matured conclusion that there is a genuine value in the lease." Also that the debtor's plan committee less than a year ago held a similar view. But the difficulty with this contention is that the record laboriously compiled as outlined above contains no *evidence* supporting the contention. The N H trustees of-
516 fered their chief accountant to show the losses resulting from B P operation. One of the N H trustees testified as to the bases for their recommendation that the lease should be rejected, thereby exposing himself to cross-examination by all parties interested. But not one of the O C directors nor any member of the debtor's Plan Committee took the stand and no opportunity was given to the court to judge whether the conclusions attributed to them by counsel rested on a firm basis.

It was urged that the lease be not rejected until it be ascertained whether "there can be an arrangement made with the Boston and Providence or with anybody else whereby the operation of B P could be continued, with a

preservation of the lease in O C without consequent increase of the charges against O C."

As to this, having just approved an accounting showing the substantial losses sustained in the B P operation, I hold it to be utterly futile to spend time ascertaining whether any responsible party will guarantee the estate against such loss in return for the expensive "privilege" of conducting such operations. O C interests have been ably represented throughout these proceedings, and if an outside "customer" could be found on such terms, 518 surely the interested parties would have produced him ere this.

The argument is also made that since after rejection the N H trustees would almost necessarily negotiate with B P for some kind of an agreement they ought to do so prior to rejection and, if such negotiations are successful, incorporate their essence in a new lease to O C, thus puting O C in a stronger position to bargain with the N H as to a plan.

When making this argument the O C directors through counsel had already agreed that the N H estate could not properly be put to further expense to keep the lease alive 519 for further negotiations. Thus they apparently rely upon a proposition announced during the hearing by counsel (and president) of B P. The B P. president announced that he would submit to B P directors a proposition whereby if the rejection of the B P lease were deferred for a limited period of time, the B P would for that period make certain waivers relating to payments of rent under the lease meanwhile permitting the N H trustees to operate the B P property at the sole cost of the New Haven; such waiver, however, to be conditioned upon an unequivocal renunciation of all right either in the N H estate or in the O C estate to charge B P for any operating losses or

for expenses incurred in the operation of said property since the institution of these proceedings.

Under this proposition, if the rejection were deferred for two years, B P would waive at most two years' rent, about $1,000,000. But the O C estate would waive a prior claim upon B P of far greater dimensions. For the record herein shows that the loss chargeable against O C on account of B P operation from June 4, 1936, to December 31, 1937, was $2,976,224. If operations are con-
521 tinued longer on the present basis, the charge will be correspondingly increased. (Two years' operation on the basis of the year 1937 would increase the loss by upwards of $5,000,000.) Thus the agreement suggested might benefit O C estate by about $1,000,000. and cost it perhaps as much as $8,000,000 (or more).

Counsel for O C interests suggest that the apparent disadvantages of such an agreement is offset by a doubt as to whether the claim against B P in favor of O C estate would, in the event of a rejection, be provable as a prior claim against B P; that consequently the claim which O C would waive has a value, if any far less than its face
522 value. But to me the discussion by counsel on this point during argument was wholly unconvincing. No precedents for such a view, either in bankruptcy or in equity, have been cited. And while I must reserve actual decision upon the point until the point is submitted for adjudication, I can properly say now that the doubt expressed as to the validity of the claim appears to be so at variance both with the underlying objectives and language of Section 77 and the fundamental principles of equity jurisprudence, that for present purposes I view the suggested agreement as being utterly incompatible with the best interests of O C estate. And notwithstanding the fact that O C interests, including Old Colony Trust Com-

pany, trustee under the O C mortgage whose bondholders would apparently suffer the chief brunt of such a waiver, all now urge the pursuit of such an agreement, I could not conscientiously approve any such agreement unless O C security holders themselves unanimously consented to the waiver. Without such consent I could not assume to give away what appears to me to be the most valuable single asset of their estate, viz., the accrued and accruing claim against B P growing out of the loss resulting from the operation of that property. Nor is it possible to say 524 that only O C security holders would be affected by the loss resulting from the waiver of this claim. It well may be that all the N H's creditors would be called upon to share that loss. Certainly it is impossible now to prophesy with assurance that the N H's claim in administration amounting up to December 31, 1937, to cover $11,000,000. can be fully satisfied out of O C assets, unless within these assets is preserved the claim over against the B P for a portion of that amount.

I cannot but conclude that the suggestion of the O C interests is a species of wishful thinking. Close study of their argument fails to show any practical method where- 525 by the O C estate can preserve for itself the doubtful benefit of the lease and escape the liability for loss resulting from continued operations thereunder.

In another aspect of the situation, the position advanced by O C interests is unsound. They assume that B P has a strategic value to the N H as a result of which arrangements will eventually be made whereby the use of B P rails will be preserved to the N H system. And the contention is apparently made that notwithstanding the fact that the lease is burdensome to the O C estate in that the operation of the leased property results in substantial losses, nevertheless O C, for trading purposes in connection with

526 *Memorandum of Decision on Petition for Order No. 217 and the Trustees' Answer Thereto.*

a plan, should share the benefit of the strategic position of B P property in the N H system.

A glance at the map will show, it is true, that B P affords the N H one link, and we all know it to be an excellent link, between the system lying west of Providence and Boston. In that sense the B P has a "strategic value" to N H. But it is equally obvious that N H gives B P its only western outlet to all the territory lying west of Providence. Thus N H would appear to have a strategic value
527 to B P. In future negotiations between the B P and N H (or in the consideration of a plan proposing to adjust those relations) if "strategic values" are considered at all, it is reasonable to suppose that the strategic value of the one will be offset against the strategic value of the other. No method has been shown whereby O C estate can properly share in the strategic value of B P to N H and yet escape the off-set of the strategic value of the N H to B P.

In this connection I pause to observe that any "strategic" value is necessarily a conception of highly conjectural quality. Even as to a year which has passed, with all the figures and statistics which have been accumulated
528 for its operations, it is obviously impossible to calculate with assurance the traffic which the N H system would have lost if the B P had not been an integral part of the N H system. The answer would depend in part upon factors now undeterminable such perhaps as the possible affiliation of B P with some other railroad system not yet identified; in part perhaps upon the comparative efficiency and scope of the N H's sales organization in meeting this newly developed competition. Upon this conjectural base, computations perhaps even more conjectural must be made to discount the future in order to arrive at the final product of a "strategic" value. Whether it is possible sufficiently to prove strategic value to justify its inclusion in

the basis of a plan, it is not now necessary to decide. Doubtless the question has no categorical answer; it would seem that each case in which the question arises must be decided on its own facts. However, common sense is sufficient authority for the proposition that a substantial claim of large dimensions should not be jeopardized for the hope of gain based upon such conjectural and undetermined "value." Thus I am prepared to hold now that when the substantial losses resulting from operations of the B P had been established by convincing evidence, 530 no burden or duty lay upon the O C trustees to negative the nebulous presence of the numerous theoretical elements of strategic value.

However, I pass that point and assume purely for purposes of present argument that the strategic value of B P to N H and the strategic value of N H to B P could and had been ascertained and when off-set against each other actually resulted in a difference favorable to B P. Even that extreme assumption will not justify an order that the B P lease be not now rejected.

For even if such a favorable balance in strategic values were found to exist, it would mean merely that some plan 531 would doubtless emerge containing an offer to the B P designed to recognize the proved existence of such values. But such an offer could be approved by the court only upon proof that it was fairly commensurate with the underlying values as proved. If the terms of the offer are not so approved, B P will not be included in the system. In that event no useful purpose would have been served by keeping the lease alive. And the same result would follow if such an offer were approved by the court but declined by B P.

But what of the rights which would exist in the event that (a) the court should approve, and (b) B P should

accept, some offer in a plan for the B P properties or the right to their use? In such an event, even if the lease had been kept alive, would O C be entitled to any benefit? This question I can only answer in the negative. To be sure, if the lease were then in life, any offer for B P property would have to be made through O C. But if the court and B P should agree that X dollars was a fair offer for B P property, and if that offer were made through O C trustees, what could the trustees do then? A. They could
533 pass the offer along to B P without extracting any slice from the consideration. In such event no useful purpose would have been served in keeping the lease alive. Or B. They could propose to retain out of the offer some lesser sum, say Y dollars, and offer B P for its property X minus Y dollars. In that event B P would naturally say "If X dollars is the fair measure of our value, we will not take less," and again the continued existence of the lease would have served no useful purpose. And if it were argued that *perhaps* B P would consent to such an arrangement, it is a sufficient answer to say that if B P wants to make a present to O C, it will be entirely at liberty to do so even
534 if the lease is rejected.

Thus on last analysis, I can only construe the position of those objecting to a present rejection as an expression of hope that when a plan is before me for consideration through inadvertence I may approve an offer for B P in excess of what the B P property is worth to the N H, or in excess of the value which the B P itself shall put upon its property. And of course I cannot act now upon the assumption that I may err later.

Counsel for O C Railroad, Debtor, in answer to my inquiry as to how the O C could be injured if by a rejection B P and the N H were left to work out their difficulties independently or in cooperation as their interests should require, replied:

535

"I think everybody—myself and everybody else—know we are now at the bottom of the curve of this depression and in a hysteria of fear. We have got the jitters. Two years from now, when this plan comes out, I am very hopeful that business is going to be much better, that the railroad business is going to be very much better, and that this lease of the Boston & Providence at that time will have some value. At that time, if it has not value, the Old Colony Trustees can reject and put everybody in just the position that 536
they will be if the rejection is made today. But in the meantime, if the lease is held for the possible benefit of Old Colony, at no loss to the Old Colony, they have merely held over a situation today that may turn out to be of real, genuine, ultimate value to the Old Colony. And if it is rejected today, that is gone forever, and can never be regained."

The argument is obviously based upon hopes and opinions not substantiated by evidence. Certainly there is nothing in the record which will justify the court in finding as a fact that either the gross revenues or the net in- 537
come available for fixed charges either of the system as a whole or of any of the leased lines will substantially improve in the future. We may properly share that hope but we may not properly make decisions of vast consequences based upon hope alone. Moreover, as demonstrated above, the argument is based upon an erroneous assumption that it is possible to hold the lease "for the possible benefit of O C, at no loss to O C." It further assumes, I believe erroneously, that because at present levels certain junior equities may appear to have no value, any confirmable plan must necessarily extinguish such equities, instead of providing for their survival, shorn perhaps

of managerial power, with a possibility under reasonable limitations of acquiring value with a return of prosperity to the system.

And the argument is fundamentally unsound in that it assumes that the court, to which this vast mass of property was entrusted for the sole and limited purpose of reorganization, may properly retain its exclusive grasp thereon for the duration of that wholly indefinite period of time which may elapse before the position of the
539 debtor's estate or any of its component parts shall substantially improve. Any act of the court in conscious cooperation with the Fabian policy suggested by this argument would in essence constitute a gigantic speculation with trust funds and constitute a gross abuse of the judicial power, repugnant alike to fundamental principles and to the language and pervading spirit of Section 77.

B P has filed a thoughtful brief which in its first section attacks the propriety of applying the segregation method to B P in numerous aspects. Thus complaint is made that the approved segregation method does not reflect the net contribution of revenues by a particular segment to sys-
540 tem revenues; does not properly treat an item covering the cost of freight car repair; is based upon a segregation period which is not sufficiently typical; does not distinguish between cash losses and losses representing only proportionate losses of the system; and also does not properly treat the expenses incidental to Back Bay station.

All of of these objections must be overruled upon the grounds stated in my memorandum of decision upon the trustees' accounting this date filed. For these objections all relate to the soundness of the particular segregation method which was approved without objection.

B P also objects that the value of its easement under

the 1904 deed in the South Boston freight terminal is not fairly reflected in the approved accounting. This objection, as shown in my memorandum on the accounting, is untenable for purposes of interim operating accounting. It is equally untenable in its application upon the issue of rejection. But upon the issue of rejection, the objection even if sound in fact and theory would none the less be immaterial. For the record shows that the aggregate loss resulting from B P operation is of such large dimensions that even if I were to sustain all the contentions on this 542
point raised in the B P brief, no change would be warranted in the ultimate conclusion, viz.: that the lease is in fact burdensome to O C estate and should be rejected.

The second section of the B P brief is devoted to the contention that the B P property has a "separation" value or a strategic value not reflected in the segregation method. The fact, of course, is true. The segregation method was neither effective nor intended to reflect "separation" or strategic values. It is equally obvious that the separation of B P from the O C system may impose some substantial losses upon both O C and B P. Likewise with respect to a separation of B P from the 543
N H system. And B P has introduced some expert testimony tending to show some of the loss resulting from a separation of B P which might fall upon N H. Its evidence, however, is inadequate to evaluate the separation loss which would fall upon either O C or B P. Nor does the record as a whole contain evidence adequate for such an evaluation.

When once it was abundantly shown by convincing evidence that B P operation is resulting in a substantial loss, with no substantial prospect of relief, the trustees' duty to reject the lease was not conditioned upon an attempted liquidation of the conjectural concepts of separa-

tion losses and strategic values in an effort to demonstrate that the debtor's plight shown by experience to be intolerable, might not by rejection become possibly worse. Experience has proved the lease to be a drain upon O C estate. If the drain increases with a rejection of the lease and cannot be stopped by other means, that problem will have but one answer, the time for which is not yet. For the present I hold only that the O C trustees must forthwith reject the B P lease, and that the N H estate must not be
545 subjected to further expense on account of the lease.

B P counsel have informed me that they may seek to reopen the record of fact in certain particulars. I will, therefore, limit the time for filing such a petition to July 8th, and assign the petition, if filed, for hearing on July 15th at 11:00 A. M., D. S. T. In the absence of such a petition, the order upon this memorandum will be settled at the date and hour last mentioned.

Dated at New Haven, this 2nd day of July, 1938.

C. C. Hincks,
546 United States District Judge.

547

Memorandum on Trustees' Report of Administration of Property of Old Colony Railroad Company and of Providence, Warren and Bristol Railroad Company, up to and Including December 31, 1937.

[SAME TITLE]

The Boston and Providence Railroad Corporation (B P) leased all its property to the Old Colony Railroad Company (O C) on April 7, 1888, for 99 years. Providence, Warren and Bristol Railroad Company (P W B) 548
leased all its property to O C on December 1, 1891, for slightly over 95 years. On February 15, 1893, O C for a term of 99 years leased all its property, including its leasehold interest in B P and P W B, to the New York, New Haven and Hartford Railroad Company (N H) which thereafter operated all said properties as an integral part of its railroad system until the institution of these proceedings on October 23, 1935. Thereafter the entire N H system was operated by the trustees appointed herein until June 1, 1936, when they rejected the O C lease to the N H. Thereupon O C filed its petition praying admission in these proceedings for reorganization as a secondary 549
debtor, and said petition was approved by the court on June 3, 1936 (Order No. 74). Trustees for the O C estate were appointed who, on February 11, 1937, rejected the P W B lease to O C, and on February 13, 1937, a petition by P W B for admission also as a secondary debtor for purposes of reorganization in these proceedings was also approved by the court, (Order No. 138) and trustees were appointed for its estate also.

By orders Nos. 75 and 150 herein, the N H trustees were directed to operate the O C properties and the P W B property, respectively, as an integral part of the N H

system. This they did and such operation has continued up to the present time.

Under date of April 19, 1937, the N H trustees filed a report of their administration of the O C properties and of the P W B property from October 23, 1935, when these proceedings for reorganization were instituted, up to December 31, 1937. To their report the said trustees appended a prayer that the court approve their account and order that the amounts stated therein be charged upon the earnings and/or properties of said subsidiary debtors
551 prior to any mortgage or other lien thereon as expenses of administration, recoverable out of the earnings and/or properties of O C and P W B by such method as the court shall hereafter determine, said accounts to be subject to such adjustments as the court may hereafter order.

Forthwith upon the filing of this report, the court ordered (Rec. P. 4239) prompt notice thereof to all interested parties with opportunity to each such party to file exceptions to said report, and assigned said exceptions for hearing on May 24, 1938. Said hearing was duly held on that date and the succeeding day, and after a continuance the record of fact was completed on June 2.

552 The account submitted shows a balance in favor of the N H estate on account of the operation by its trustees of property owned by O C in the amount of $5,775,650, and a balance in favor of the N H estate on account of the operation by its trustees of property owned by the B P in the amount of $5,461,451, both of the foregoing balances covering the period from October 24, 1935 to December 31, 1937; also a balance in favor of the N H estate on account of its operation by its trustees of property owned by P W B in the amount of $157,421, said balance covering operations from October 24, 1935 to June 3, 1936, and a balance in favor of the N H estate on account of operation by its trustees of property owned by the P W B in

the amount of $394,515.22, said balance covering operations from June 4, 1936 to December 31, 1937.

By order dated May 3, 1938, the court approved the appointment of Robert G. Dodge and Oscar M. Shaw, both of whom were identified with O C interests and were free from all interests conflicting therewith, as special counsel for the trustees of the O C estate, "in their name and behalf to interpose and prosecute such exceptions and objections to said report and petition as they in their untrammeled judgment shall consider proper and advantageous to the estate of Old Colony Railroad Company." 554

The special counsel for the O C trustees, appointed as aforesaid, interposed objections to the accounting and at the hearing thereon their prosecution of these objections was adopted by O C Railroad Company, the secondary debtor herein, by the Protective Committee of O C Shareholders, and by B P.

These objections, insofar as the same have been pressed, either on hearing or on brief, I will deal with seriatim.

I

It is objected that O C is improperly charged with payments under its lease, capital expenditures and operating deficits made or incurred during the period prior to June 3, 1936, that being the date when immediately after the rejection of the O C lease by the trustees of the principal debtor, the petition of the O C Railroad Company for reorganization as a secondary debtor in these proceedings was approved by this court. In support of this objection, it is argued that no orders in these proceedings and no principle of underlying law justifies a charge upon the O C or its property for such payments, expenditures and operating deficits incurred during the breathing spell between the institution of these proceedings and the re- 555

jection of the O C lease. This argument cannot be sustained upon the facts here involved.

For here O C by its petition for reorganization prayed that the N H trustees "be authorized and directed to continue until further order to operate the petitioner's property for the account of the petitioner——". And the court by Order No. 75 (June 18, 1936) directed the N H trustees "to possess and operate the properties of Old Colony Railroad Company, such operation to be for the account of Old Colony Railroad Company or the trustees of its
557 property". A similar order (No. 150) providing for the operation of P W B property was entered on March 10, 1937.

All payments made by the N H trustees on account of O C and P W B properties were made pursuant to Order No. 17 (Rec., P. 132) requiring that with respect to payments made by the N H trustees to comply with the obligation of the debtor on the leases in case such leases should be rejected "the operation of the leased premises shall have been and said payments shall be deemed to have been made for the account of the lessors, and such payments shall be recovered, set-off, or made and charged,
558 on the earnings and/or properties of the lessors prior to any mortgage or other lien thereon——". When O C, upon its own petition was admitted as a party, indeed as a secondary debtor, in these proceedings, it was chargeable with knowledge of the provisions of Order No. 17. When thereafter O C acquiesced in payments made and expenses incurred by the N H trustees on account of the leased properties thereby accepting the resulting benefits, it knew or ought to have known that the transactions were controlled by Order No. 17. Thus neither O C, nor its trustees in behalf of its creditors and shareholders, are in position to resist the incidence of Order No. 17 upon the O C estate.

Let it be conceded, at least for the sake of objectors' argument, that Order No. 17 when entered was ineffective of its own vigor to saddle upon O C any obligation either *in personam* or *in rem*. Nevertheless, the filing of the N H petition was notice to all the world of the assumption of jurisdiction by the court and likewise notice that those thereafter operating the property did so as officers of the court and subject to its orders. That being so, those receiving payments or benefits from such fiduciaries were chargeable with notice of the existence of lawful and express limitations upon the authority of such fiduciaries, 560
and specifically with notice that the payments made or services rendered would, in the words of Order No. 17, in the event of a rejection of the lease "be deemed to have been made for the account of the lessors, and such payments shall be recovered, set-off, or made and charged, on the earnings and or properties of the lessors prior to any mortgage or other lien thereon." When with knowledge of this limitation upon the trustees, the lessor thereafter accepted payments and benefits by and from the trustees, by its acquiescence it subjected its person and estate to the liabilities which the court now is called upon to adjudge. 561

Likewise as to P W B.

And if Order No. 17 left any doubt as to the liability of the secondary debtors for such payments made and expenses incurred by the N H estate, that doubt was completely dispersed by Orders Nos. 75 and 150.

The orders referred to did not constitute a special device for the creation of some novel liability. They constitute rather the timely statement of a liability long recognized in equity jurisprudence and in administration under the Bankruptcy Act. When as here, a lease of railroad property is rejected, the lessor having been unable or unwilling itself to resume the responsibilities of operation,

the lessor is chargeable with payments, expenditures and operating deficits made or incurred in connection with such operation by the lessee's receiver or trustee during the breathing spell, and the lessee's receiver is accountable only for the net earnings, if any. *Pennsylvania Steel Co.* v. *N. Y. City Ry. Co.*, 198 Fed. 721, at page 729, *et seq.*; *Ames* v. *Railway Co.*, 74 Fed. 325, at page 334; *Mercantile Trust Co.* v. *Farmers Loan and Trust Co.*, 81 Fed. 254, at page 258; *Union Trust Co.* v. *Illinois Midland R. Co.*, 117 U. S. 434; *Pennsylvania Steel Co.* v. *N. Y. C. Ry.*
563 *Co.*, 216 Fed. 458, at page 463; *American Brake Shoe & F. Co.* v. *New York Railways Co.*, 282 Fed. 293, affirmed 282 Fed. 523; *Westinghouse Electric Mfg. Co.* v. *B. R. T. Co.*, 6 Fed. (2nd) 547; *Westinghouse Electric Mfg. Co.* v. *B. R. T. Co.*, 291 Fed. 836, at page 857.

The objectors rely upon the *Second Avenue* case (*Pennsylvania Steel Co.* v. *N. Y. City Ry. Co.*, 225 Fed. 734). But that case holds only that a lessor who is willing and able to repossess and operate railway property may not be required to return to its lessee's receiver payments of rent *made as such* during the breathing spell in excess of net earnings. Indeed, the opinion stresses the fact that
564 there it was not until after the lessee's receiver had paid a sum equivalent to the stipulated rent for a considerable period that he even sought to have the payments treated as made only for the lessor's account. The discussion in *Westinghouse Electric & Mfg. Co.* v. *B. R. T.*, 6 Fed. (2nd) 547, shows clearly that the holding in the *Second Avenue* case is not broad enough to sustain as a general proposition the rule that a lessor which, like O C, confessedly is unable to repossess and operate, can escape liability for operating deficits sustained by lessee's receiver during the breathing spell; or even that such a lessor may irrevocably or arbitrarily appropriate to the discharge of rental obligations created by the rejected

lease payments made by lessee's receiver during the breathing spell which were expressly made *only for the lessor's account.*

However that may be, the *Second Avenue* case turned on facts not present here. There, the lessor was apparently ready and willing to re-enter; otherwise it would not have been in a position to exercise "the option of asking for the return of its property from the receivers in case they operated for net earnings only." Here, after the rejection of the lease, the lessor filed a formal petition to be admitted as a secondary debtor in these proceedings 566
wherein it acknowledged that its re-entry "was impracticable and contrary to the public interest and would entail irreparable loss and damage to the petitioner and its security holders." Furthermore, in the *Second Avenue* case, receiver acted under an order of court authorizing the payment of rent, *qua* rent. Here, the trustees in making the payments now questioned were acting under Order No. 17.

II.

It is objected that payments and operating deficits 567
made and incurred prior to June 3, 1936, even if chargeable against the O C estate, are not entitled to priority over the O C mortgage. This contention also must be overruled.

Here, again, the court under Section 77 of the Bankruptcy Act must rely upon the established principles of equity jurisprudence for its guide. The cases of *Pennsylvania Steel Co.* v. *N. Y. C. R. Co.*, 163 Fed. 242; *do.*, 190 Fed. 609; *Ames* v. *Union Pacific Ry. Co.*, 74 Fed. 335, demonstrate the existence of an equitable doctrine requiring the subordination of the O C mortgage lien to the imposition of the charges now under consideration. See

also *Union Trust Co.* v. *Illinois Midland R. Co., supra.* The doctrine is in harmony with Section 77 (c) (3) providing for issues of certificates having "priority in payments over existing obligations, secured or unsecured."

III.

The objections assert on brief that only (1) claims based upon the "six months' rule" and (2) claims based upon the "necessity of payment rule" can be allowed priority
569 over existing liens. The assertion, I think, overlooks the fact that here we are not concerned with the claim of a creditor, but rather with a settlement of accounts growing out of the administration of the properties by the court. The payments and accounts now in question were incurred by the authority and under the administration of the court. They are in the nature of administration expenses which for generations both in equity and in bankruptcy have been accorded priority over existing liens. Cf. *Union Trust Co.* v. *Illinois Midland R. Co., supra.* Thus the cases cited by the objectors defining the limits of the technical rules mentioned above have utterly no applica-
570 tion here.

IV.

The objectors' contention that the payments, etc., during the period prior to June 3, 1936, should be set off against O C's claim against the N H has no basis whatever if, as I hold, these payments constitute not an anti-bankruptcy contractual claim in favor of the N H estate against the O C estate, but instead an integral and proper part of an account of the administration of the properties by this court wholly arising out of the period ensuing after the intervention of bankruptcy.

V.

It is next objected that under the law of Massachusetts the Bankers Trust Company, trustee under the First and Refunding Mortgage, as an assignee of the lease is liable to O C for the breach of the covenants of that lease; and that no charge should be imposed upon the O C estate until this alleged remedy against Bankers Trust has been exhausted.

But this objection, even if its assertion of a liability on Bankers Trust Company be sound, does not touch the 572
validity or the accuracy of the accounting for the operation of the O C properties, nor affect the liability of the O C estate thereon to the N H estate. If the O C trustees consider that O C estate has a substantial claim against Bankers Trust Company, the decision on the pending matters will not foreclose the prosecution of that claim.

VI.

The approval of the account is also resisted on the ground that the rejection of the B P lease, if it is rejected, will relate back to June 3, 1936, when the proceedings for 573
the reorganization of O C as a secondary debtor were instituted so that consequently in legal contemplation O C never became chargeable with the expenditures made upon B P property or with the deficits incurred in its operation accruing after that date.

This contention rests upon a claimed but unwarranted analogy between the breach of anti-bankruptcy claims of a contractual origin and administration claims arising out of the operation of the properties by the court. I quite agree that any claims in favor of B P growing out of a rejection of the B P lease will need be ascertained as of the date of June 3, 1936. But ever since that date the pri-

mary responsibility for the operation of B P property has rested upon the O C estate. If such operation had proved profitable, the profit would have inured to the benefit of O C estate, rather than the N H estate. Now that the operation has proved costly, the cost is primarily chargeable against O C estate rather than the N H estate.

VII.

I must now digress to sketch the evolution, status and
575 nature of the segregation method, since an understanding of this is essential to a consideration of further objections to the accounting.

When the system of the debtor came into the custody of the court upon the institution of these proceedings, the debtor's books of account as would naturally be expected were upon a system basis. Consequently, it was impossible to ascertain therefrom the earnings of the numerous segments of the system which were subject to separate lien or lease. Upon the suggestion implicit in the prayer of O C in Petition for Order No. 74 that a segregation and allocation of the system earnings amongst these various
576 segments would eventually be indispensable in these proceedings, the court by Order 74 ordered that the debtor record the basic data from which such a segregation might be made. Thereafter the statistics and research bureau, under the employment and general supervision of the trustees and in constant consultation and under the continuous observation of experts retained by the Insurance Group and the Savings Bank Group, with careful study developed a method (sometimes referred to as a formula) by application of which to the system revenues and expenditures it became possible to ascertain the earnings allocated to the respective segments.

When on October 6, 1937, Bankers Trust Company, as

trustee under the First and Refunding Mortgage of the principal debtor, filed its petition for Order No. 217, alleging that the results of operation of the B P by the N H trustees showed a substantial loss if computed upon the basis of the segregation method thus evolved and praying that the N H trustees be directed to cease making any cash payments under the terms of the B P lease, I forthwith entered an order limiting the time wherein the parties might plead to said petition, and foreseeing that a decision upon the petition would necessarily bring into issue the segregation method I ordered the parties to show cause 578
why the segregation method evolved as aforesaid should not be referred to the Interstate Commerce Commission for recommendation pursuant to sub-division (c) (10) of Section 77 of the Bankruptcy Act. After hearing upon this order and without objection, on October 29, 1937, I entered an order reciting that O C, B P and O C Shareholders Protective Committee had challenged the segregation method as constituting a proper basis for the determination of the earnings of O C and B P and, finding that a segregation and allocation of the earnings and expenses as between the numerous mortgaged and leased divisions of the system were required by the necessities of 579
the case, ordered the reference to the Commission. On April 15, 1938, the Commission filed its report recommending that the "trustees' method of segregation and allocation of the debtor's revenues and expenses between and to its various mortgaged and leased lines is as fair and equitable as the circumstances will permit." This report was noticed for consideration at the continued hearing upon Petition for Order No. 217 on May 24, 1938. And at that hearing and on that day without objection from any source the recommendation of the Commission was ordered accepted and filed. The trustees' account now before the court is based upon the method of segregation

recommended as aforesaid by the Commission and accepted as aforesaid by the court. However, the Interstate Commerce Commission in its report prefaced its summary of the method and its conclusions with this observation: "Our function, as we construe the order of reference and the language of section 77 (c) (10), is to recommend to the court a method or formula that will permit the ascertaining, with some certainty, of the earnings, as well as the expenses, of each mortgaged and leased line operated as an integral part of the debtor's system. Our
581 recommendations herein are in no wise intended to express any views with respect to the use of the results obtained from the application of the formula or the weight to be given such results."

In view of the foregoing, I hold that it is now too late to question the equity or accuracy of the segregation method which after so much labor has been finally approved.

Doubtless it is still open to attack the propriety of using the segregation method for the solution of any specific problem. And such attack might have added force if it pertained to a problem soluble by another more direct method.
582 Certain features of the briefs now before me suggest that the present line of attack is directed against the propriety of resort to the segregation method for the solution of the specific problem now presented. If this be so, I have no hesitation in holding that for all purposes of the present accounting, and more specifically for the ascertainment of the system revenues and expenses properly allocable to the O C properties, owned and leased, the use of a proper segregation method is proper and indeed, in view of the situation; the only method available or conceivable. Certainly, no other practical method has been suggested throughout the course of these protracted proceedings.

A word now about the basic theory which underlies the

method. It takes as its starting point the actual system's revenues and expenses for the "segregation year," *i. e.*, the year ending May 31, 1937. This figure is, of course, wholly free from conjecture. It is the product of actual experience.

From this starting point, the method, recognizing that the system is the sum of its parts, allocates the entire revenues and expenses of the system amongst the numerous segments which are subject to separate paramount lien and lease. Thus the accomplished result is such that the system as an entity disappears and we see nothing but 584
a group of numerous segments which, between them enjoy all the revenues and necessarily must be deemed to have assumed *all* the expenses.

But the method recognizes the obvious inequity of leaving one segment which includes a valuable and expensive facility which serves not only the "owner-segment" but also perhaps several "user-segments," to bear all the expense of that singly-owned but severally-used facility. Consequently the method provides how such an expense shall be allocated amongst the segments involved and provides for a charge in the nature of rental against a user-segment. This is accomplished by the application 585
of use-factors, the detail of which it is not now necessary to discuss since the equity of the process has already received illuminating and approving discussion by the Commission in its report and has been approved by the court after hearing duly noticed without objection from any source.

As a result, it must be borne in mind throughout that a user-segment cannot be relieved of the charge, or any part thereof, resulting from the application of an approved use-factor unless that charge is absorbed by some other segment. Thus individual changes in the application of the method are inconsistent with the inherent integrity of the method.

VIII.

O C interests, joined by B P, object that the N H trustees have not shown that O C as lessee of the B P has made or is entitled to make any use of the old N E terminals or tracks, and that consequently the operation of the B P property ought not to be charged with any part of the cost of the railway taxes accruing against N E property or interest upon the capital investment in N E property. The account as submitted shows such a charge against
587 B P operation amounting to approximately $570,000 annually.

This objection is predicated upon the theory that B P so far as its freight traffic is concerned is nothing but a bridge line between Providence and Readville, and that therefore a statement of its freight operations ought not to reflect the incidence of the items mentioned upon N E property intermediate between Readville and Boston. This objection in effect I overruled by excluding evidence in support thereof at the hearing. However, since the claim is reiterated on brief, that ruling may again be noted.

588 The bridge line theory now advanced appears to be historically incorrect. As long as it retained its Park Square terminal certainly B P was a through carrier of freight from Providence to Boston. A shift in its eastern freight terminal from Park Square to South Boston neither in fact nor theory transformed B P from a through carrier to a bridge line. It is not contended that the freight carried by B P easterly to Readville has its destination there. Indeed, if Readville were treated as a physical terminus of B P property, that property would seem to have no strategic value to any railroad except O C and N H. The fact is, of course, that for years freight has been moving over the B P line by reason of

the use made of N E tracks between Boston and Readville and the South Boston freight facilities. That being so, under the basic theory of segregation in order to allocate to B P its fair proportion of the system expenses the allocation must fairly reflect the use which B P has made of these N E facilities. The segregation studies were designed to accomplish just such an adjustment. For the studies showed unequivocally that B P freight operations were treated as through traffic. The segregation method evolved includes provision for such adjustments. And now that the method has been approved by the Commission 590
and the court, it is too late to contend that the method is unfair or otherwise improper.

I will reiterate therefore my ruling and hold that these items are properly chargeable against B P operation.

IX.

O C interests object that the account as submitted improperly charges the O C estate with the sum of $130,730.95, representing railway taxes and interest on investment accruing during the accounting period upon so much of the South Boston Freight Terminal and connecting 591
tracks as was subject to the easement of B P under its deed of 1904 from the N H, the N E and the O C.

By order No. 221, the time for appeal from which has long since expired, it was finally established that B P acquired under the deed of 1904 the perpetual right to the joint use of such part of said freight terminal as would furnish facilities fairly equivalent to those which it had had at Park Square, without obligation to contribute to the cost of such terminals and to the payment of taxes thereon. And by the same order it was determined that the right of B P thus adjudicated was subject to the prior lien of the New England Consolidated Mortgage of 1895

and the New York and New England Trust Indenture of 1889; also that the N H was under no obligation to relieve the B P easement from the burden of these mortgages.

The record shows that the trustees' account as submitted liquidates the amount of tax and interest accruals for the accounting period upon the servient property subject to the B P easement at the sum of $130,730.95. This sum transformed and thus reduced to an annual basis amounts to $59,699.79. This latter sum therefore represents the annual accruals upon that portion of N E property which is subject to the easement conveyed to B P by the deed of 1904. This portion I shall refer to as the "servient property."

593

Since in the preceding section of this memorandum I have held that the operation of B P property was properly subject to an annual charge of $570,000 on account of the benefit derived by B P from its use of N E properties, and since the servient estate is but a part of these same properties, I have in effect already ruled that this annual charge of $59,699.79 is properly charged against B P operation, at least for purposes of an operating accounting.

594

To be sure, under the deed of 1904 B P acquired an easement to use the servient property without charge for taxes or interest on investment. But this easement, as we have seen, is subject to the N E mortgages which constitute a paramount lien on N E properties including servient property. I have already ruled that B P operation is properly charged with $570,000 annually on account of its entire use of N E facilities. If I relieve B P operation of any part of that charge as I am now asked to do, I can do so only by shifting the charge to some other segment. If any such shift is made, the N E segment is the only logical candidate for this unwelcome legacy. Certainly,

there has been no showing of the propriety of saddling this charge upon any other segment. Nor does the approved segregation method contemplate any other incidence for the charge. Having already ruled that the N E segment is entitled to the credit corresponding to the entire charge of $570,000, in view of the subordination of the B P easement to the N E mortgages, I cannot consistently hold that the N E segment should be penalized on account of a junior incumbrance.

If a plan of reorganization shall ever come before the court under which the values of the N E and the B P 596
properties shall be in issue, it then conceivably may be necessary to determine the effect, if any, of the B P easement upon these values. In such case, it would not necessarily follow that B P would derive no benefit from its easement. For the conflicting interests of the N E bondholders and of B P in the servient property, like the conflicting interests of first and second mortgagees with respect to some other segment, might perhaps be handled by computing the value of the segment upon the basis of earnings; and if it were thus found that the value of the segment exceeded the amount due on the first mortgage, the excess of such value perhaps might be considered in 597
ascertaining the value of the incumbrance, next in rank, be it second mortgage or easement. However, I mention such a method of appraisal now not as an assurance that it will later have my approval but rather to demonstrate that the present objection pertains to a question which is certainly now academic and which may never arise. Such at least is my hope.

CONCLUSION.

The account is therefore approved in the amount stated, viz.: $11,789,037.22 and may be charged in accordance

with the prayer of the petition appended to the report of the trustees.

An order accordingly may be submitted and will be settled on July 15, 1938, at 11:00 A. M., D. S. T.

Dated at New Haven this 2nd day of July, 1938.

C. C. HINCKS,
United States District Judge.

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599 **Petition of Boston and Providence Railroad Corporation to Reopen Record upon Petition for Order No. 217 and Agency Account Annexed to Trustees' Report of Administration, and for Further Hearing Thereon.**

(Filed July 8, 1938.)

[SAME TITLE]

PETITION FOR ORDER NO. 296.

600 Now comes Boston and Providence Railroad Corporation and respectfully represents:

1. Upon May 24 and 25, 1938, hearings were held before this Court, among other things, upon the Agency Account annexed to the Trustees' Report of Administration of Old Colony and the Providence, Warren and Bristol properties and upon the petition of Bankers Trust Company for Order No. 217. The hearing upon the Agency Account was continued upon June 2, 1938. The Agency Account filed by the Trustees included certain charges against Old Colony for taxes and interest on investment in certain freight terminal facilities in South Boston on account of the alleged use of said facilities by the Boston and Providence. The determination of these

charges involved the application of this Court's Memorandum of Decision on Petition for Order No. 221 herein. This Memorandum of Decision contained no findings of fact or rulings of law concerning the methods to be employed in determining what portion of the present Boston freight facilities of the debtor constitutes a physical "fair equivalent for, ... and no less than" the freight facilities formerly enjoyed by the Boston and Providence up to the time when it discontinued its road northerly of Dartmouth Street in Boston. The Memorandum of Decision on Petition for Order No. 221 did not contain any 602
ruling of law as to the properties in South Boston upon which the New England Railroad Company's mortgages are a lien, nor did it consider the question whether the after acquired property clause in this mortgage was effective as to properties subsequently acquired by the New Haven in its own name.

2. At the hearing on June 2, 1938, counsel for the trustees called Mr. Coyle of the trustees' staff to the stand to describe the methods used in applying the Court's decision No. 221 to the Segregation and Agency Account. This testimony was distributed to counsel in memorandum form at the hearing and was subsequently marked "Exhibit 14". 603

This exhibit stated that from a certain map the authors of the Agency Account were able to determine the length of the tracks, the area of the land, and the area of the freight houses and platforms which the Boston and Providence had used for its freight business in the Park Square freight terminal. The measurements stated in the exhibit were as follows:

Tracks—Boston and Providence				Park Square	2.2 miles
Land	"	"	"	"	414,460 sq. ft.
Freight Houses	"	"	"	"	113,080 sq. ft.

The exhibit also contained certain measurements in corresponding facilities in South Boston.

3. The ratio of the measurements obtained from the map of the Park Square terminal to the measurements of the debtor's present freight terminal facilities in South Boston was then used to determine the "equivalent" facilities in the existing terminals to which the Boston and Providence was entitled to free use. Counsel who were present at the hearing on June 2, 1938, had no opportunity to make a careful check of the methods described or
605 the figures contained in Exhibit 14. The positive statement contained in Exhibit 14 concerning the measurements in the Park Square Terminal and the witness's testimony implied that the measurements were capable of absolute determination without resort to preliminary questions of judgment or conjecture. A proper assumption was that the measurements so stated by the witness included all facilities in the Park Square Terminal which were available or could have been used for the handling of freight traffic. The Record of Fact was closed shortly after the witness left the stand without further illumination upon the methods so employed either by counsel or
606 by representatives of the Trustees.

Subsequent to the hearing the Petitioner made an independent measurement of the facilities shown upon the map of the Park Square Terminal.

4. Upon information and belief:

The measurements in the Park Square Terminal of the Boston and Providence were as follows:

Total track in yard	4.6 miles
Track available for handling freight	3.0 miles
Area, freight houses and platforms	113,080 sq. ft.
Total area of land in terminal	721,950 sq. ft.
Area of land available for handling freight	465,000 sq. ft.

The Trustees have been guided in their measurements of the facilities in the Park Square Terminal solely by the guess of their General Real Estate Agent as to the facilities which probably were used as a matter of fact for the handling of freight traffic. They have given no consideration to facilities which may have been available for freight purposes whether or not actually so used. Moreover, the Trustees have classified the so-called Massachusetts Avenue and South Hampton Street freight yards in South Boston together with certain strips of land along the New England Railroad Company's right 608 of way as being subject to the lien of the New England Mortgages, although these properties were acquired by and in the name of the New Haven subsequent to the grant to the Boston and Providence of the right to use these facilities. Title to said parcels has never been in the New York and New England Railroad Company, the New England Railroad Company or in the Trustees under the mortgages of said railroad companies, nor has the New England Railroad Company ever paid any consideration for these properties.

5. The petitioner submits that the methods used by the 609 trustees to determine the present facilities in South Boston which are equivalent to those formerly owned by the Boston and Providence are improper, and if sanctioned by the Court would give to the Boston and Providence far less than the equivalent contemplated by the grantors of the right. The trustees have assumed to decide these questions without the advice of the Court and without consulting other parties whose interests are vitally affected by the methods adopted. It is submitted that the record now before the Court relating to the methods employed by the Trustees to determine the "equivalent" facilities in South Boston to which the Boston and Providence has the right to free use is misleading and that jus-

tice and equity require that the petitioner and other interested parties be afforded an opportunity to present further evidence and to be heard upon the matters herein set forth.

WHEREFORE, your petitioner respectfully prays

(1) that the record of fact upon Petition for Order No. 217 and the Agency Account annexed to the trustees' report of administration be reopened;

611

(2) that a hearing be had at which the petitioner and any other interested party may present evidence and be heard upon the questions relating to the methods employed by the trustees in determining the present facilities to which the Boston and Providence is entitled to free use;

(3) that this Court grant the petitioner such other and further relief as the Court may deem equitable and proper.

BOSTON AND PROVIDENCE RAILROAD CORPORATION
By BENTLEY W. WARREN
612 President.

July 7, 1938.

WARREN, GARFIELD, WHITESIDE & LAMSON
30 State Street
Boston, Massachusetts

BENTLEY W. WARREN
JOHN NOBLE, JR.
DONALD C. STARR
of Counsel.

(Verification omitted in printing)

Extract from Minutes of Hearing Held on July 15, 1938, at 11:00 A. M., D. S. T., on Petition of Boston and Providence Railroad Corporation to Reopen Record upon Petition for Order No. 217 and Agency Account Annexed to Trustees' Report of Administration, and for Further Hearing Thereon. 613

Before: HONORABLE CARROLL C. HINCKS, District Judge.

[SAME TITLE]

APPEARANCES: 614

For the Trustees of the Estate of the Principal Debtor
W. W. MEYER, ESQ.
H. J. WELLS, ESQ.
H. H. CORBIN, ESQ.

For the Trustees of Old Colony Railroad Company on the Accounting Matter, and for Old Colony Railroad Company on all other Matters Raised at the Hearing
OSCAR M. SHAW, ESQ.

For Boston & Providence Railroad Corporation
BENTLEY W. WARREN, ESQ.
JOHN NOBLE, JR., ESQ.
DONALD C. STARR, ESQ. 615

For Bank of New York
WILLIAM P. PALMER, ESQ.
STUART N. SCOTT, ESQ.

For the Insurance Group of Bondholders of the New Haven System
MALCOLM FOOSHEE, ESQ.
EDWARD M. DAY, ESQ.

For Bankers Trust Company, Trustee Under the First and Refunding Mortgage of the Principal Debtor
WHITE & CASE, ESQUIRES
by JESSE E. WAID, ESQ.

616 **Order on Trustees' Report of Administration of Property of Old Colony Railroad Company and of Providence, Warren and Bristol Railroad Company up to and Including December 31, 1937.**

[SAME TITLE]

ORDER No. 300.

The Trustees of the property of the Principal Debtor herein having filed a report dated April 19, 1938, of their
617 administration of the property of Old Colony Railroad Company and of Providence, Warren and Bristol Railroad Company from October 23, 1935, when these proceedings were insfituted, up to and including December 31, 1937, and said report having come on for hearing duly noticed and the Court having considered the facts and arguments presented and having issued its Memorandum of Decision dated July 2, 1938, and the Court upon petition of Boston and Providence Railroad Corporation having, on July 15, 1938, reopened the record of fact and said Boston and Providence Railroad Corporation, said Trustees, and the Trustee under The New
618 England Railroad Company Consolidated Mortgage having presented additional evidence and having been heard upon questions relating to the methods employed by the Trustees of the property of the Principal Debtor in determining the rights of the Boston and Providence, under the provisions of Order No. 221 herein, in certain freight facilities in Boston and vicinity, and due notice of the settlement of this order having been given, it is

ORDERED, ADJUDGED AND DECREED:

1. That the accounts as stated in said report be and they hereby are approved in the amount of $11,789,-

037.22, viz.: (a) $5,775,650, covering administration of the property of Old Colony Railroad Company for the period October 24, 1935 to December 31, 1937 (both dates inclusive); (b) $5,461,451, covering administration of the property of Boston and Providence Railroad Corporation for the same period; and (c) $551,936.22, covering administration of the property of Providence, Warren and Bristol Railroad Company for the same period.

2. That $11,237,101.22 of said amount be and it hereby constitutes a lien, charge or claim on the earnings and 620
property of Old Colony Railroad Company as an expense of administration prior to any mortgage or other lien thereon and to any other indebtedness of said Company, and may be recovered by the Trustees of the property of the Principal Debtor herein out of the earnings or property of said Old Colony Railroad Company by such method as the Court shall hereafter determine.

3. That the incidence of the $551,936,22 for administration of the property of Providence, Warren and Bristol Railroad Company be and it hereby is reserved for later determination. 621

4. That the question of interest upon said amounts be and it hereby is reserved for later determination.

ENTER:

C. C. HINCKS,
District Judge.

Dated: July 18th, 1938.

622

Order on Petition of Bankers Trust Company, as Trustee, for Order No. 217.

[SAME TITLE]

ORDER No. 217.

These proceedings having come on further duly to be heard on May 24 and 25 and June 2, 1938, upon the petition of Bankers Trust Company, as Trustee, verified
623 October 6, 1937 (Petition for Order No. 217) (R. p. 3263), and upon all relevant pleadings or other papers filed or orders entered or other proceedings had or taken with regard thereto, including (without limiting the generality of the foregoing) the method or formula embodied in a volume prepared by the Trustees of the property of the Principal Debtor entitled "New York, New Haven and Hartford Railroad Segregation of Earnings" (herein called the "Formula"), the order of reference dated October 29, 1937 entitled "Order of Reference to Interstate Commerce Commission for its Recommendation as to the Method or Formula by which Earn-
624 ings of the Railroad System shall be Segregated and Allocated" (R. p. 3587), the Report of the Commission made April 9, 1938 and filed with this Court on April 15, 1938 (R. p. 4241), the answer dated May 3, 1938 of the Trustees of the property of the Principal Debtor and the Trustees of the property of Old Colony Railroad Company recommending "that they be authorized and directed (a) to withhold any and all payments due or to become due under the terms of the Lease dated April 7, 1888 from Boston and Providence Railroad Corporation to Old Colony Railroad Company and (b) to reject said Lease" (R. p. 4309), and the order of the Court heretofore entered approving and adopting the

Formula and the Report of the Interstate Commerce Commission with respect thereto (R. p. 4241); and all parties having been heard or given opportunity to be heard; and the Court having entered its Decision dated July 2, 1938 entitled "Memorandum of Decision on Petition for Order No. 217 and the Trustees' Answer Thereto" (R. p. 4497); and Boston and Providence Railroad Corporation having on July 8, 1938 filed its Petition for Order No. 296 to reopen the record of fact herein, which petition was not pressed and was orally denied without exception at a hearing on July 15, 1938;

Now, after due deliberation, the Court being fully advised in the premises, hereby:

ORDERS, ADJUDGES AND DECREES:

1. The Trustees of the property of Old Colony Railroad Company (herein called the "Old Colony Trustees") shall forthwith disaffirm and reject the Lease dated April 7, 1888 from Boston and Providence Railroad Corporation (herein called the "Boston and Providence") to Old Colony Railroad Company (herein called the "Old Colony"). Notice of such disaffirmance and rejection shall be sufficient if sent by United States registered mail in a securely sealed postpaid wrapper addressed to the Boston and Providence, c/o Bentley W. Warren, Esq., at 30 State Street, Boston, Massachusetts.

2. Promptly after mailing such notice, the Old Colony Trustees shall file with this Court a Report of such mailing.

3. Neither the Old Colony Trustees shall make, nor the Trustees of the property of the Principal Debtor (herein called the "New Haven Trustees") shall make for the account of the Old Colony or of the Old Colony Trus-

tees, any further payments under the terms of the Lease dated April 7, 1888 from the Boston and Providence to the Old Colony; nor shall the estate of the Principal Debtor be subjected to further outlay on account of said Lease.

4. If and to the extent that any provisions contained in Order No. 75 (R. p. 817) or any provisions contained in any other orders entered herein prior to the date of this order are inconsistent with the foregoing provisions
629 of this order, such inconsistent provisions are terminated.

5. Pending further order of Court the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision (c) (6) of Sec. 77 of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without
630 expense to the New Haven estate.

The Court reserves for further hearing the right to determine the existence and amount of any obligation of Boston and Providence arising out of operation of its property or payments made to it or on its behalf prior to the rejection of its lease, and the liability of the Boston and Providence therefore to the Old Colony estate and by way of subrogation to the New Haven estate. And pending such determination the Court will withhold its final ruling on Petition for Order No. 276.

ENTER:

C. C. HINCKS,
District Judge.

Dated: July 19th, 1938.

631

Report of Mailing of Notice of Rejection of Lease dated April 7, 1888, from Boston and Providence Railroad Corporation to Old Colony Railroad Company.

[SAME TITLE]

Now come Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, the Trustees of the property of Old Colony Railroad Company, by W. W. Meyer, their Counsel, and respectfully report to the Court:

That pursuant to authority granted in Order No. 217 632
herein, said Trustees have given notice to Boston and Providence Railroad Corporation of the rejection of the unexpired lease dated April 7, 1888 from Boston and Providence Railroad Corporation to Old Colony Railroad Company.

An affidavit of mailing is hereto attached showing that a copy of said notice, in a securely sealed wrapper, postage prepaid, was sent by United States registered mail on July 19, 1938 to Boston and Providence Railroad Corporation, c/o Bentley W. Warren, Esq., 30 State Street, Boston, Massachusetts.

Said notice is attached to said affidavit of mailing. 633

HOWARD S. PALMER, JAMES LEE LOOMIS
AND HENRY B. SAWYER, Trustees.
By W. W. MEYER,
their Counsel.

Dated: July 19, 1938.
Filed: July 19, 1938.

(Affidavit and Notice omitted in printing.)

634 **Petition of Trustees for a Charge upon the Earnings and Property of Boston and Providence Railroad Corporation for Administration for the Period June 4, 1936, to December 31, 1937.**

(Filed July 29, 1938.)

[SAME TITLE]

635 PETITION FOR ORDER No. 301.

Now come Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as the Trustees of the property of the Principal Debtor (hereinafter sometimes called "the New Haven Trustees") and of Old Colony Railroad Company (hereinafter sometimes called "the Old Colony Trustees"), and respectfully represent:

1. By Order No. 74 entered herein June 3, 1936, the petition of Old Colony Railroad Company for reorganization herein was approved and the New Haven Trustees were ordered until further order to continue to operate
636 the property of said Old Colony Railroad Company for its account.

2. By paragraph 2, subparagraph (c), of Order No. 75 entered herein June 18, 1936 said New Haven Trustees were empowered and authorized to pay such sums as might be necessary to comply with the obligations of Old Colony Railroad Company under contracts or leases, but that such payments should not constitute affirmation of such contracts or leases or any of them, and by paragraph 7 of said Order it was provided that said Trustees, either as such or as Old Colony Trustees, should not inten-

tionally make or permit any default in the performance of any contract or lease to which Old Colony Railroad Company was a party unless and except upon the advice and with the consent of the Court previously obtained after hearing duly noticed. By paragraph 9 of said Order the Old Colony Trustees were authorized at any time prior to November 15, 1936, or prior to such other day as might be provided by further order of the Court, and with the advice and consent of the Court after hearing duly noticed, to reject any of the existing contracts or leases of said Old Colony Railroad Company; and it was 638
further provided in said paragraph 9 that the performance by Old Colony Railroad Company, by the Old Colony Trustees or by the New Haven Trustees for the account of Old Colony Railroad Company, of any such contract or lease within said period or future periods allowed for rejection should not constitute or be evidence of the adoption or acceptance of such contract or lease by Old Colony Railroad Company or by the Old Colony Trustees, or the waiver of the right to disaffirm or reject the same, and that in case payments were made pursuant to the authority granted by the terms of said order or of any other order in the proceeding, to comply with the 639
obligations of said Old Colony Railroad Company under leases and such leases should be subsequently disaffirmed or rejected by Old Colony Railroad Company or by the Old Colony Trustees or under a plan of reorganization, "the operation of the leased properties shall have been and the said payments shall be deemed to have been made for the account of the lessor, and such payment shall be recovered, set-off, or made and charged, on the earnings and properties of the lessor, prior to any mortgage or other lien thereon by such method as the Court shall determine, and further reserving all rights and equities of the parties arising from such payments." Boston and

Providence Railroad Corporation, its officers, agents and counsel have had knowledge of the said terms of Order No. 75 continuously since its entry.

3. By Orders No. 97, 125, 148, 167, 198, 205, 213, and 221A the time within which leases of Old Colony Railroad Company might be rejected was extended from time to time, the last of said orders, entered October 27, 1937, extending the time until further order of the Court. Boston and Providence Railroad Corporation, its officers,
641 agents and counsel have had knowledge of the terms of said orders continuously since their entry.

4. By Order No. 267 the Court after hearing duly noticed, granted the petition of the petitioners herein to permit postponement of the payment due April 1, 1938, under the lease from Boston and Providence Railroad Corporation to Old Colony Railroad Company, dated April 7, 1888, during the grace period of thirty days stipulated in said lease. By Order No. 271, upon petition of the petitioners herein alleging that they had received assurances from the President of Boston and Providence
642 Railroad Corporation that prior to the expiration of said grace period the Board of Directors of said Corporation would authorize him to agree with Old Colony Railroad Company and the Old Colony Trustees that if said payment due April 1, 1938, was not made within said grace period said Corporation would not claim any right of reentry or of forfeiture of said lease prior to June 1, 1938, the Court, after notice and hearing, permitted further postponement until June 1, 1938, of said payment due April 1, 1938. By Order No. 284 upon oral motion in open Court of counsel for petitioners herein at the hearing May 25, 1938, upon Petition for Order No. 217 and upon assurance from the President of Boston and Provi-

dence that said Corporation had consented to claim no right of re-entry or forfeiture prior to July 1, 1938, for delay in the payment due April 1, 1938, the Court permitted further postponement until July 1, 1938, of said payment. By Order No. 292 the Court authorized and directed the petitioners herein to withhold any and all payments due or to become due under the aforesaid lease pending entry of the Court's order upon Petition for Order No. 217.

5. By Order No. 217, entered herein on July 19, 1938, 644
the Court ordered the Old Colony Trustees forthwith to reject the lease dated April 7, 1888 from Boston and Providence Railroad Corporation to Old Colony Railroad Company.

6. Pursuant to said Order No. 217 said Old Colony Trustees mailed on July 19, 1938, to Boston and Providence Railroad Corporation notice of their rejection of said lease, and on the same day said Trustees filed with this Court a report of such mailing.

7. By Order No. 300, entered herein on July 18, 1938, 645
the Court approved the New Haven Trustees' report dated April 19, 1938, of administration of property of Old Colony Railroad Company from October 23, 1935, when these proceedings were instituted up to and including December 31, 1937, and ordered that the amount of $11,237,101.22 constitutes a charge on the earnings and property of Old Colony Railroad Company as an expense of administration prior to any mortgage or other lien thereon and to any other indebtedness of said Company and may be recovered by the New Haven Trustees out of the earnings or property of said Old Colony Railroad Company by such method as the Court shall hereafter determine.

8. Said amount included $3,955,298.93 covering payments made under the aforesaid lease and expenditures incurred in administration of property of Boston and Providence Railroad Corporation during the period June 4, 1936 to December 31, 1937 (both dates inclusive), as follows:

Payments under lease obligations	$ 922,250.00
Net capital expenditures	56,824.31
Operating deficits	1,355,565.40
647 Charges for handling company coal and interest on investment in equipment and other facilities	1,620,659.22
Total	$3,955,298.93

9. The detail making up said $3,955,298.93 is as shown on Old Colony Exhibit #2 introduced at the hearing May 24, 1938, upon the aforesaid report of the New Haven Trustees dated April 19, 1938, copy of the pertinent parts of which exhibit is hereto annexed marked Exhibit A and made a part hereof.

648 10. Petitioners propose to submit their report of administration of the property of Boston and Providence Railroad Corporation during the period January 1, 1938, to the date of rejection as soon as the figures are available.

Wherefore, petitioners pray that the Court approve said account against the Boston and Providence Railroad Corporation for the period June 4, 1936 to December 31, 1937, and order that said $3,955,298.93 with such interest thereon as is later determined to be payable constitute a lien and charge on the earnings and property of Boston

and Providence Railroad Corporation in the possession of this Court prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said Company as an expense of administration of said property of said Company by the Trustees of the property of the Principal Debtor herein on behalf and for the account of the Trustees of the property of Old Colony Railroad Company, and may be recovered by said Trustees of the property of Old Colony Railroad Company or, in the alternative, by the Trustees of the property of the Principal Debtor out of the earnings and property of said 650
Boston and Providence Railroad Corporation by such method as the Court shall hereafter determine, and that to the extent that said amount is so recovered by said Trustees of the property of the Principal Debtor the like charge against the earnings and property of Old Colony Railroad Company heretofore allowed by Order No. 300 shall be correspondingly reduced, and that the Court reserve for later determination the amount of like charges covering administration of the property of said Boston and Providence Railroad Corporation from January 1, 1938, to the date of rejection of the aforesaid lease.

651

Dated: July 27, 1938.

H. S. Palmer,
James Lee Loomis,
Henry B. Sawyer,
Trustees.

W. W. Meyer,
Counsel for Trustees.

(Verification omitted in printing.)

Exhibit A.

Howard S. Palmer, James Lee Loomis, Henry B. Sawyer, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor, and of Old Colony Railroad Company, Debtor.

Excerpts From Old Colony Exhibit #2. Dated May 17, 1938 Filed at Hearing on Trustees' Report of Administration of Old Colony Railroad—May 24, 1938.

653 Statement of Payments made by Trustees to comply with Obligations under Lease dated February 15, 1893, from Old Colony Railroad Company to The New York, New Haven & Hartford Railroad Company.

Boston & Providence Railroad Corporation Lease dated April 7, 1888 to Old Colony Railroad Company
For the Period June 4, 1936 to December 31, 1937

Date Paid	*Detail*	*Period Covered*	*Gross Amount*
6-29-36	Div. on 40,000 shares stock @ 10%	4-1-36 — 6-30-36	$100,000.00
9-28-36	" " 40,000 " " " 10%	7-1-36 — 9-30-36	100,000.00
12-29-36	" " 40,000 " " " 10%	10-1-36 — 12-31-36	100,000.00
3-29-37	" " 40,000 " " " 10%	1-1-37 — 3-31-37	100,000.00
6-29-37	" " 40,000 " " " 10%	4-1-37 — 6-30-37	100,000.00
9-30-37	" " 40,000 " " " 10%	7-1-37 — 9-30-37	100,000.00
12-27-37	" " 40,000 " " " 10%	10-1-37 — 12-31-37	100,000.00
654 6-29-36	Int. on $2,170,000 5% Debs. due 1938	1-1-36 — 6-30-36	54,250.00
12-16-36	" " $2,170,000 5% " " 1938	7-1-36 — 12-31-36	54,250.00
6-15-37	" " $2,170,000 5% " " 1938	1-1-37 — 6-30-37	54,250.00
12-27-37	" " $2,170,000 5% " " 1938	7-1-37 — 12-31-37	54,250.00
Various	Miscellaneous Organization Expenses	12-31-35 — 12-31-37	5,250.00
	Total June 4, 1936 to December 31, 1937		$922,250.00

Summary of Net Capital Expenditures and of Net Salvage Credits for Property Retired and Not Replaced for Account of Old Colony Railroad Company and the Trustees of its Property.

Boston and Providence

June 4, 1936 to December 31, 1937

Net Capital Expenditures	$63,743.39
Net Salvage Credits	6,919.08
Net Balance due for Capital Expenditures	$56,824.31

New Haven, Conn.
May 17, 1938.

Howard S. Palmer, James Lee Loomis, Henry B. Sawyer, Trustees of the property of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, and of OLD COLONY RAILROAD COMPANY, DEBTOR.

EXCERPTS FROM OLD COLONY EXHIBIT #2 DATED MAY 17, 1938 FILED AT HEARING ON TRUSTEES' REPORT OF ADMINISTRATION OF OLD COLONY RAILROAD—MAY 24, 1938.

Statement of Revenues and Expenses of Operating the Property of Boston and Providence Railroad Corporation. 656

	Total June 4, 1936 to December 31, 1937
Operating Revenues:	
Freight	$ 5,433,804.05
Passenger	4,141,004.18
Other	1,841,468.50
Total Operating Revenues	11,416,276.73
Operating Expenses:	657
Maintenance of Way and Structures	1,304,892.59
Maintenance of Equipment	2,429,098.56
Traffic	188,511.32
Transportation	5,614,248.98
Miscellaneous Operations	271,255.33
General	493,471.23
Transportation for Investment—Cr.	355.22
Total Operating Expenses	10,301,122.79
Net Revenue from Railway Operations	1,115,153.94

Credit

Railway Tax Accruals		1,390,252.31
Hire of Freight Cars—Dr. Balance		372,281.23
Other Equipment Rents—Net Dr.		43,741.80
Joint Facility Rents—Net Dr.		670,578.17
Net Railway Operating Income	#	1,361,699.57
Non-Operating Income		$ 232,207.54
659 Gross Income	#	1,129,492.03
Deductions from Gross Income		226,073.37
Net Income	#	$ 1,355,565.40
Intra System Items:		
Handling Company Coal		$ 129,635.97
Interest on Investment in Equipment		281,613.57
Interest on Investment in Facilities		1,209,409.68
Total Intra System Items		$ 1,620,659.22
660 TOTAL DEFICIT INCLUDING INTRA SYSTEM ITEMS		$ 2,976,224.62

Deficit

New Haven, Conn.,
May 17, 1938.

661

Petition of The Provident Institution for Savings in the Town of Boston, Creditor.

(Filed August 4, 1938.)

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF MASSACHUSETTS.
IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD.

In the Matter of BOSTON AND PROVIDENCE RAILROAD CORPORATION, Debtor.	No. 62,413.

662

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS:

The petition of The Provident Institution for Savings in the Town of Boston, a Massachusetts savings bank corporation (hereinafter sometimes referred to as the "Petitioner" or "Creditor"), for reorganization under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy of Boston and Providence Railroad Corporation (hereinafter referred to as the "Debtor"), respectfully represents: 663

(1) That the Debtor is a railroad corporation organized and existing under the laws of the States of Massachusetts and Rhode Island, and is a citizen and resident of the State of Massachusetts; that it is a common carrier by railroad engaged in the transportation of persons and

property in interstate commerce in the States of Massachusetts and Rhode Island, and is not a street, suburban or interurban railway; that during the six months' period immediately preceding the filing of this petition the Debtor has had, and now has, its principal executive office in the City of Boston, Massachusetts, in the District of Massachusetts.

(2) That the Debtor under date of April 7, 1888, leased
665 all of its railroad and property of every description to Old Colony Railroad Company for a term of ninety-nine years from April 1, 1888; that Old Colony Railroad Company under date of February 15, 1893, leased its property to New York, New Haven and Hartford Railroad Company for a term of ninety-nine years from March 1, 1893, the New York, New Haven and Hartford Railroad Company covenanting and agreeing to perform all of the undertakings and obligations of the Old Colony Railroad Company with respect to the latter's lease of the Boston and Providence property; that on October 23, 1935, the New York, New Haven and Hartford Rail-
666 road Company filed its petition for reorganization under said Section 77 of the Bankruptcy Act in the District Court of the United States for the District of Connecticut, alleging among other things that it was unable to meet its debts as they matured, and that it desired to effect a plan of reorganization pursuant to said Section 77; that on June 2, 1936, the trustees of the New York, New Haven and Hartford Railroad Company gave notice of the rejection of the New York, New Haven and Hartford Railroad Company's lease of Old Colony Railroad Company, and upon the same day the Old Colony Railroad Company filed its petition for reorganization under said Section 77 in the same proceeding in said District Court

of the United States for the District of Connecticut, alleging among other things that a majority of its capital stock having power to vote for the election of directors was owned by the New York, New Haven and Hartford Railroad Company, and that it was unable to meet its debts as they matured, and that it desired to effect a reorganization in connection with, or as a part of the plan of reorganization of said New York, New Haven and Hartford Railroad Company; that on July 19, 1938, the trustees of Old Colony Railroad Company gave notice 668
of the rejection of the Old Colony Railroad Company's lease of the Debtor, Boston and Providence Railroad Corporation; that coincident with the rejection of the Debtor's lease the United States District Court in the Connecticut proceedings has ordered that neither the Old Colony Trustees shall make, nor the New Haven Trustees shall make, for the account of the Old Colony or of the Old Colony Trustees, any further payments under the terms of the Debtor's said lease dated April 7, 1888, and that the New Haven estate shall not be subjected to further outlay on account of said lease, and that pending further order of the Court, the operation of the property of the 669
Debtor for the account of the Debtor "shall be continued, pursuant to sub-division (c). (6) of Sec. 77 of the Bankruptcy Act, and since Old Colony Railroad Company as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate."

(3) That under date of July 2, 1923, the Debtor made an issue of debenture bonds for the aggregate principal

sum of $2,170,000. known as the Fifteen-Year Five Per Cent. Gold Debenture Bonds of the Debtor, promising to pay the principal of same on the first day of July, 1938, with interest thereon from July 2, 1923, at rate of five per centum (5%) per annum semi-annually on the first day of January and July in each year; that said issue of debenture bonds constituted the entire funded indebtedness of the Debtor, and your Petitioner having arranged to take the entire issue at par in redemption of a then
671 maturing issue bearing interest at six per centum (6%) the said issue of $2,170,000. principal amount of Fifteen-Year Debenture Bonds, dated July 2, 1923, maturing July 1, 1938, were all issued to and made payable to your Petitioner or registered assigns, and your Petitioner is still the registered holder and owner of said entire issue; that the payment of the $2,170,000. principal of such Debenture Bonds maturing and due July 1, 1938, as well as interest thereon due July 1, 1938, amounting to the sum of $54,250., although demanded by your Petitioner, has been refused by the Debtor, and said principal and said interest remains unpaid and by rea-
672 son of such continuing defaults the claims of your Petitioner as a Creditor of the Debtor aggregate not less than five (5) per centum of all the indebtedness of the Debtor as shown in the latest annual report which has been filed with the Interstate Commerce Commission by the Debtor at the time of the filing of this petition (being the annual report for the year ending December 31, 1937, filed with the Interstate Commerce Commission on March 29, 1938), and in fact aggregate *all* of the indebtedness of the Debtor as shown in such latest annual report excepting only certain current liability items as there shown aggregating approximately $62,325, of which $54,250. thereof represented the accrued interest payable

January 1, 1938, on the aforesaid Debenture Bonds owned by your Petitioner, and excepting only a tax liability item as there shown of approximately $57,580; that the Debtor's cash balance on July 31, 1938, was $141,146.12; that the Debtor is without sufficient funds to pay and discharge the aforesaid Debenture Bonds, and is unable to meet such indebtedness and its other debts, obligations and liabilities as they mature; that the Debtor, not having filed a petition under said Section 77 with your Honorable Court, which your Petitioner is advised is the 674
only court in which the Debtor might file a petition under said Section 77, your Petitioner as a duly qualified creditor of the Debtor, now files this petition pursuant to and as provided for by the provisions of said Section 77, proposing that the Debtor shall effect a reorganization thereunder, and files the same in good faith.

(4) That copies of this petition are this day being filed with the Interstate Commerce Commission, and served upon the Debtor.

(5) That the filing of this petition by and on behalf 675
of the Petitioner was duly authorized by resolution of its Board of Investment, adopted at a meeting thereof duly held on the second day of August, 1938.

WHEREFORE, your Petitioner prays that an order may be entered approving this petition as properly filed under said Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and that this Court take and exercise its jurisdiction over the property and affairs of the Debtor, and make such orders and enter such judgments and decrees from time to time as may be proper, necessary or incidental to the reorganization,

debt and corporate structure of the Debtor, and that the Debtor may be allowed to effect a plan of reorganization, and that your Petitioner and the Debtor be granted all other and further relief to which it or the Debtor may be entitled.

THE PROVIDENT INSTITUTION FOR SAVINGS
IN THE TOWN OF BOSTON,
By /s/ WM. ARTHUR DUPEE, Treas.

677 Dated, August 3, 1938.

/s/ GASTON, SNOW, HUNT, RICE & BOYD,
/s/ THOMAS HUNT,
/s/ JOHN C. RICE,
Attorneys for Petitioner.

(Verification omitted in printing.)

Answer of Boston and Providence Railroad Corporation, Debtor.

678 [SAME TITLE]

Now comes Boston and Providence Railroad Corporation Debtor as alleged in petition of The Provident Institution for Savings in the Town of Boston for reorganization of Boston and Providence Railroad Corporation under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and for answer to the said petition, admits the jurisdiction of this Court and the material allegations of the said petition.

BOSTON AND PROVIDENCE RAILROAD
CORPORATION,
By BENTLEY W. WARREN,
President and Counsel.

August, 4, 1938.

679

Order Approving Petition of The Provident Institution for Savings in the Town of Boston, Creditor, for Reorganization Herein of Boston and Providence Railroad Corporation.

[SAME TITLE]

Upon due consideration of the petition of The Provident Institution for Savings in the Town of Boston, verified August 3, 1938, and filed August 4, 1938, alleging among other things that Boston and Providence Railroad 680
Corporation is a railroad corporation organized and existing under the laws of the States of Massachusetts and Rhode Island, and is a common carrier by railroad engaged in the transportation of persons and property in interstate commerce in those states, with its principal executive office in the City of Boston, in the District of Massachusetts; that Boston and Providence Railroad Corporation is confronted with indebtedness in substantial amounts, and is unable to meet its debts as they mature, and that Petitioner as a creditor, having claims aggregating not less than five (5) per centum of all the indebtedness of said Railroad Corporation, as shown in the latest 681
annual report filed with the Interstate Commerce Commission, proposes that said Railroad Corporation shall effect a reorganization herein; and the Boston and Providence Railroad Corporation, having made and filed its answer to such petition, admitting the jurisdiction of this Court and the material allegations of the petition, and the Court being satisfied that said petition complies with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy as amended, and has been filed in good faith, it is

682 *Order Approving Petition of The Provident Institution for Savings in the Town of Boston, Creditor.*

ORDERED:

1. That said petition be, and it hereby is, approved as properly filed under such Section 77.

2 That until further order, all persons, firms and corporations whatsoever, and wherever situated, located or domiciled, be and they hereby are restrained and enjoined from interfering with, seizing, converting, appropriating,
683 attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties, or premises belonging to, or in the possession of the Debtor, Boston and Providence Railroad Corporation, or from interfering in any manner with the present operation of its railroad or properties or the carrying on of its business until the further order or orders of this Court.

* * * * *

Witness the Honorable FRANCIS J. W. FORD, Judge of
684 the said court, and the seal thereof, at Boston, in said district, on this fifth day of August, 1938.

ARTHUR M. BROWN
Deputy Clerk

August 5, 1938

685

Answer of Bankers Trust Company, as Trustee, to Trustees' Petition for Order No. 301.

(Filed August 9, 1938.)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF CONNECTICUT.

In Proceedings for the Reorganization of a Railroad

No. 16562.

686

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT:

BANKERS TRUST COMPANY, as Trustee (herein called the "Mortgage Trustee") under the First and Refunding Mortgage dated December 9, 1920 and supplements thereto (herein called the "Mortgage") of the New York, New Haven and Hartford Railroad Company (herein called the "Principal Debtor"), for its answer to the petition dated July 27, 1938 of Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the property of the Principal Debtor, for a charge upon the earnings and property of Boston and Providence Railroad Corporation for administration for the period June 4, 1936 to December 31, 1937:

687

1. Admits the allegations contained in said petition, but refers to the petition, orders, and other writings therein mentioned for more complete information concerning the contents thereof, respectively.

688 *Answer of Bankers Trust Company, as Trustee, to Trustees' Petition for Order No. 301.*

FURTHER ANSWERING SAID PETITION, THE MORTGAGE TRUSTEE ALLEGES:

2. By the Mortgage, the Principal Debtor granted, bargained, sold, released, conveyed, assigned, transferred, pledged and set over to the Mortgage Trustee the properties therein described, subject as therein set forth (Granting Clauses, pages 14 to 31).

3. Section 1 of Article Eight (page 94) of the Mort-
689 gage provides that until some default shall have been made under the Mortgage and shall have continued as therein stated, or until other events shall have happened as therein set forth, the Railroad Company (the Principal Debtor herein) shall be suffered and permitted to retain possession of all the mortgaged property; to manage, operate and use the same; and to "collect, receive, use and enjoy in any manner not inconsistent with the provisions hereof the tolls, earnings, income, rents, issues and profits thereof."

4. Default has been made under the Mortgage in the respect set forth in the petition verified November 4,
690 1935 of the Mortgage Trustee for leave to intervene herein (Petition for Order No. 6), and said default still continues. By reason of such default, the Mortgage Trustee was, upon the happening thereof, and is entitled to exercise the rights and remedies specified in Article Seven (pages 77 to 93) of the Mortgage as exercisable upon the happening of a default.

5. On or about November 4, 1935, the Mortgage Trustee filed herein its Petition for Order No. 7 entitled "Petition of Bankers Trust Company, as Trustee, for Segregation Order" (R. page 47). In said petition, the Mortgage Trustee demanded that "all tolls, earnings,

revenue, rents, issues, profits and other income derived from operation of properties covered by the lien of the Mortgage and the Third Supplement thereto, and all other income covered by the lien of the Mortgage, be segregated, sequestered and impounded" for the benefit of the Mortgage Trustee and the holders of Bonds and pre-existing obligations secured by the lien of the Mortgage and the Third Supplement thereto (R. page 51). On or about January 17, 1936, this Court entered herein its Order (Nos. 7, 18 and 29) entitled "Order upon Petitions for Segregation of Earnings" wherein, among other things, it was ordered, adjudged and decreed that no trustee of a mortgage covering property included in the Railroad System of the Principal Debtor should be required to make any further demand or application for the enforcement in this proceeding of any lien or right in respect of any of the tolls, earnings, incomes, rents, issues and profits of the property covered by the mortgage, and that the rights of each mortgage trustee should be determined as if due demand or application had been made by such mortgage trustee at the earliest date or dates when any such mortgage trustee would have been entitled to make such demand or application under the terms of the mortgage of which it is trustee, or as a matter of law (R. page 315). 692 693

6. Upon information and belief:

Regardless of the aforesaid order entitled "Order upon Petitions for Segregation of Earnings" and irrespective of the provisions of said order, the demand of the Mortgage Trustee embodied in its aforesaid petition entitled "Petition of Banks Trust Company, as Trustee, for Segregation Order" was effective and sufficient, as a mat-

ter of law, to impound for the Mortgage Trustee and the holders of Bonds and pre-existing obligations secured by the Mortgage all income derived from the property covered by the lien of the Mortgage or derived from the operation thereof; and all such income earned subsequent to the date of filing said petition (Petition for Order No. 7) was and is covered by the lien of the Mortgage, subject only to payment of necessary expenses incurred and to be incurred in the operation of the property covered
695 by the lien of the Mortgage. The properties of Boston and Providence Railroad Corporation are not covered by the lien of the Mortgage except by virtue of subrogation, as hereinafter alleged; and sums paid in respect of the lease from Boston and Providence Railroad Corporation to Old Colony Railroad Company do not, expenditures incurred in administration of the property of Boston and Providence Railroad Corporation do not, and sums expended in maintaining such property in safe operating condition or otherwise expended in respect of such property do not, constitute operating expenses of the Trustees of the property of the Principal Debtor.

696 7. On June 2, 1936 (R. page 721), the Trustees of the property of the Principal Debtor disaffirmed the lease from Old Colony Railroad Company to the Principal Debtor. Therefore, since October 23, 1935, operation of the properties of Old Colony Railroad Company (including the properties leased by Old Colony Railroad Company from Boston and Providence Railroad Corporation), by the Trustees of the property of the Principal Debtor has been, and is, at the risk and expense and for the account of Old Colony Railroad Company, or the Trustees of its property.

8. Upon information and belief:

Such disaffirmance necessarily involved and included the disaffirmance and rejection by said Trustees of all obligations in respect of the lease from Boston and Providence Railroad Corporation to Old Colony Railroad Company, or in respect of the properties described in or covered by said lease. In regard to said lease, there exists on the part of the Trustees of the property of the Principal Debtor neither privity of contract nor privity of estate with Boston and Providence Railroad Corporation; and funds from whatever source derived which, upon a proper allocation, are allocable to the Mortgage Trustee for the benefit of the holders of Bonds and pre-existing obligations secured by the Mortgage and which are covered by the lien of the Mortgage, may not lawfully be expended upon or in respect of properties not covered by the lien of the Mortgage, unless not only is the reimbursement thereof, with interest, to the Mortgage Trustee secured by a senior lien and charge upon the properties, and income therefrom, upon or in respect of which any sums are so expended, but also such senior lien and charge are adequate and sufficient to assure and guarantee such reimbursement to the Mortgage Trustee. The properties and funds upon which a senior lien and charge may be imposed to secure the reimbursement to the Mortgage Trustee of expenditures made subsequent to June 3, 1936 (the date on which the original petition of Old Colony Railroad Company was filed for relief in this proceeding) in respect of the lease of Boston and Providence Railroad Corporation or the properties described therein or covered thereby are not sufficient or adequate to assure or guarantee such reimbursement to the Mortgage Trustee, unless such senior lien and charge are imposed upon the properties of Boston and Providence Railroad Corporation described in or covered by

said lease and the income, if any, hereafter derived from the operation of such properties.

9. Upon information and belief:

All payments or expenditures heretofore made by the Trustees of the property of the Principal Debtor in respect of the lease from Boston and Providence Railroad Corporation to Old Colony Railroad Company, or in ad-
701 ministration of the property of Boston and Providence Railroad Corporation, or in maintaining and preserving said property in safe operating condition, or otherwise in respect of said property, have been made "for the account of Old Colony Railroad Company and the Trustees of its property," and have not been made by the Trustees of the property of the Principal Debtor for their own account, or for the account of the Principal Debtor or the Mortgage Trustee. A part or all of the payments or expenditures so made were made out of funds impounded by the Mortgage Trustee.

702 10. On July 19, 1938, pursuant to Order No. 217, the Old Colony Trustees disaffirmed the lease from Boston and Providence Railroad Corporation to Old Colony Railroad Company (R. p. 4624). Such disaffirmance related back to June 3, 1936 (the date on which the original petition of Old Colony Railroad Company was filed for relief in this proceeding). Subsequent to June 3, 1936, operation of the property of Boston and Providence Railroad Corporation by the Old Colony Trustees, or by the New Haven Trustees for account of the Old Colony Trustees, has been at the risk and expense and for the account of Boston and Providence Railroad Corporation; unless otherwise repaid to the Trustees of the property

of Old Colony Railroad Company, or to the New Haven Trustees, all deficits resulting from the operation of such property, all payments made in respect of the Boston and Providence lease, and all expenditures made upon the property of Boston and Providence Railroad Corporation in order to maintain and preserve such property in safe operating condition, or otherwise in respect of such property, with interest thereon, constitute a lien and charge upon the earnings and property of Boston and Providence Railroad Corporation in the possession of 704
this Court, prior to any mortgage or other lien, charge or claim thereon, and prior to any other indebtedness of Boston and Providence Railroad Corporation, as an expense of administration of said property of said Company by the Trustees of the property of the Principal Debtor herein on behalf and for the account of the Trustees of the property of Old Colony Railroad Company and are recoverable by said Trustees of the property of Old Colony Railroad Company or, in the alternative, by the Trustees of the property of the Principal Debtor, out of the earnings and property of said Boston and Providence Railroad Corporation. To the extent that said amount 705
is so recovered by said Trustees of the property of the Principal Debtor, the like charge against the earnings and property of Old Colony Railroad Company heretofore allowed by Order No. 300 (R. p. 4593) should be correspondingly reduced.

11. Upon information and belief, as a matter of law:

The right so existing in the Trustees of the property of Old Colony Railroad Company to recover out of the earnings and property of Boston and Providence Railroad Corporation, with interest, the sums hereinabove alleged, is a right to which the Mortgage Trustee is

entitled to be subrogated directly, or through the Trustees of the property of the Principal Debtor, to the extent that any of the sums so paid or expended represent funds impounded by the Mortgage Trustee.

12. Upon information and belief:

On or about August 4, 1938, in the United States District Court for the District of Massachusetts, The Provident Institution for Savings of Boston filed against Bos-
707 ton and Providence Railroad Corporation a petition for reorganization of said Boston and Providence Railroad Corporation under Section 77 of the Bankruptcy Act, as amended. The jurisdiction of said Court in said proceedings is limited to jurisdiction over the reversionary interest or estate of Boston and Providence Railroad Corporation in its property; and said Court does not and will not, by reason of the institution of the said proceedings or of any action taken therein, have jurisdiction over the property of Boston and Providence Railroad Corporation which is in the possession of and being administered by this Court in this proceeding. In this pro-
708 ceeding, this Court has paramount and exclusive jurisdiction of said property. This Court may not lawfully surrender possession of said property to Boston and Providence Railroad Corporation, or to any Trustee or Trustees who may hereafter be appointed in said proceeding filed in the United States District Court for the District of Massachusetts, unless and until all sums now due and payable or hereafter becoming due and payable from Boston and Providence Railroad Corporation, or from any Trustee or Trustees of its property hereafter appointed by the United States District Court for the District of Massachusetts, shall first have been paid, or provision for the payment thereof satisfactory to this

Court and to the Mortgage Trustee shall first have been made; and such payment, or the making of satisfactory provision thereof as aforesaid, is a condition precedent to the lawful surrender by this Court of possession of said property, which, together with any earnings therefrom, stand as security for the payment of such sums impressed in equity with a lien and charge in favor of the Old Colony Trustees or the New Haven Trustees, and by subrogation in favor of the Mortgage Trustee to the extent aforesaid, prior to any mortgage or other lien, 710
charge or claim on said property and prior to any other indebtedness of Boston and Providence Railroad Corporation.

WHEREFORE, the Mortgage Trustee respectfully:

1. Joins in the prayer of said petition;

2. Further prays that, to the extent that this Court shall hereafter determine that expenditures of whatever character made upon or with respect to the property of Boston and Providence Railroad Corporation, or the lease 711
of such property to Old Colony Railroad Company during the period subsequent to June 3, 1936, were made out of funds representing income impounded by the Mortgage Trustee, the Mortgage Trustee be subrogated to such claim against Boston and Providence Railroad Corporation and to a lien and charge upon the earnings and property of the Boston and Providence Railroad Corporation in the possession of this Court prior to any mortgage or other lien, charge, or claim thereon and prior to any other indebtedness of said Corporation;

3. Further prays that the property of Boston and Providence Railroad Corporation in the possession of

this Court be not surrendered to Boston and Providence Railroad Corporation, or to any Trustee or Trustees of its property who may hereafter be appointed, unless and until all sums due or becoming due from Boston and Providence Railroad Corporation, or any such Trustee or Trustees, shall first have been paid, or provision for such payment shall first have been made which is satisfactory to this Court and to the Mortgage Trustee; and

713 4. Further prays for such other and further relief as the Mortgage Trustee may hereafter apply for, as to the Court may seem just and proper.

Dated, August 6, 1938.

BANKERS TRUST COMPANY, as Trustee,
By R. C. HOGAN,
Vice-President.

(Seal)

Attest:

G. H. HAYES,
Assistant Secretary.

714

WIGGIN & DANA,
205 Church Street,
New Haven, Conn.

WHITE & CASE,
14 Wall Street,
New York, N. Y.
Its Attorneys.

FREDERICK H. WIGGIN,
JESSE E. WAID,
of Counsel.

(Verification omitted in printing.)

715

Extracts from Minutes of Hearing Held on August 9, 1938, at 11:00 A. M., D. S. T., on Petition for Order No. 301, Petition of Trustees for a Charge upon the Earnings and Property of Boston and Providence Railroad Corporation for Administration for the Period June 4, 1936, to December 31, 1937.

[SAME TITLE]

Before:

HONORABLE CARROLL C. HINCKS,
District Judge. 716

APPEARANCES:

For the Trustees of the Property of the Principal Debtor:
H. J. WELLS, ESQ.

For Old Colony Railroad Company:
O. M. SHAW, ESQ.

For Boston & Providence Railroad Corporation:
BENTLEY W. WARREN, ESQ.,
DONALD C. STARR, ESQ. 717

For Bankers Trust Company, Trustee under the First and Refunding Mortgage of the Principal Debtor:
FREDERICK H. WIGGIN, ESQ.,
STEWART H. JONES, ESQ.,
JESSE E. WAID, ESQ.

For the Bank of New York:
STUART N. SCOTT, ESQ.

For the Insurance Group:
EDWARD M. DAY, ESQ.

Hincks, J.: Were temporary trustees appointed [for the Boston and Providence]?

Mr. Warren: No, they were not, your Honor.

Hincks, J.: The Debtor was ordered continued in possession pending the hearing?

Mr. Warren: I would rather read it. It happened while I was away. [Refers to paper.] After the ordinary injunctive language against all persons levying upon or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, etc.,—or premises be-
719 longing to or in possession of the debtor, Boston & Providence Railroad Corporation, or interfering in any manner with the present operation of its railroad or properties or the carrying-on of its business, until the further order or orders of this Court.

It seems to me that protects the trustees of both the Old Colony as lessee and the New Haven as lessee of the Old Colony; and your own Order provides, if that is to be done, "For account of the Boston & Providence." The Court here seems rather carefully to have avoided interfering with that.

So that I cannot see that anybody suffers any possible
720 injury by delaying until there is someone who really does represent the Boston & Providence to appear here.

Hincks, J.: I feel, on the whole, that there should be a continuance. The hearing has been set for the 22nd. It may be that with diligence the appointment can then be made and confirmation by the Commission forthcoming by the second week of September.

I think the hearing should be continued to a time certain, and, if it appears that the situation will not be ripe for hearing then, an application for a further continuance can be made. I should think a date around the middle of September would be in order. Any further objections to such a date? [Pause] I will note now a continuance until Monday, September 12, at 2:00 P. M.

721

Order Continuing Date of Hearing on Petition for Order No. 301.

[SAME TITLE]

Upon oral motion of counsel for Boston and Providence Railroad Corporation and the representation that the Interstate Commerce Commission has not as yet acted upon the appointment of trustees for said corporation by the United States District Court for the District of Massachusetts in the proceedings for the reorganization of said 722
corporation in said court,

IT IS HEREBY ORDERED that the hearing upon Petition for Order No. 301 heretofore set for September 12th, 1938, be continued until September 26th, 1938, at 2:00 P. M. in the court room at New Haven.

Dated at New Haven this 9th day of September, 1938.

C. C. HINCKS,
United States District Judge.

723

Order Continuing Date of Hearing on Petition for Order No. 301.

[SAME TITLE]

Upon oral motion of counsel for Boston and Providence Railroad Corporation and the representation that the Interstate Commerce Commission has not as yet acted upon the appointment of trustees for said corporation by

the United States District Court for the District of Massachusetts in the proceedings for the reorganization of said corporation in said court,

IT IS HEREBY ORDERED that the hearing upon Petition for Order No. 301 heretofore set by continuance for September 26, 1938, be continued until October 14, 1938, at 10.30 A. M., in the court room at New Haven.

Dated at New Haven, this 22nd day of September,
725 1938.

C. C. HINCKS,
United States District Judge.

Order Continuing Date of Hearing on Petition for Order No. 301.

[SAME TITLE]

Upon the motion of counsel for Boston and Providence
726 Railroad Corporation, and the representation that the Interstate Commerce Commission has not as yet acted upon the appointment of trustees for said Corporation by the District Court of the United States for the District of Massachusetts in the Proceedings for the Reorganization of said Corporation in said Court,

IT IS HEREBY ORDERED that the hearing upon Petition for Order No. 301, heretofore set by continuance for October 14, 1938, be continued until November 9, 1938, at 10:30 A. M., in the court room at New Haven.

Dated at New Haven, this 17th day of October, 1938.

C. C. HINCKS,
United States District Judge.

727

Order Respecting Filing of Objections to Allowance of Petition for Order No. 301.

[SAME TITLE]

Hearing upon Petition for Order No. 301 dated July 27, 1938, having been repeatedly continued upon motion of counsel for Boston and Providence Railroad Corporation pending action of the Interstate Commerce Commission upon the appointment by the United States District Court for the District of Massachusetts in proceedings 728
for the reorganization of said Corporation of Bentley W. Warren and Charles W. Mulcahy, both of Boston, Massachusetts, as Trustees of the property of said Corporation, and this Court being advised that the Commission has now ratified said appointments, and no objections having been filed to said petition and the hearing thereon now being set for November 9 at 10:30 A. M., it is ORDERED:

That any and all objections to the allowance of Petition for Order No. 301 shall be filed herein on or before October 31, 1938.

That petitioners be and they hereby are directed to 729
give notice of this order by mailing within two days a copy hereof together with a copy of said petition, by registered mail to each of said Trustees of the property of Boston and Providence Railroad Corporation, and by timely mailing of copies of this order to all parties who have been permitted to intervene generally herein or to their attorneys, and to all other parties who are customarily notified of hearings in these proceedings.

ENTER:

C. C. HINCKS,
District Judge.

Dated: October 20, 1938.

730

Order Continuing Date of Hearing on Petition for Order No. 301.

[SAME TITLE]

Upon motion of counsel for the petitioners and good cause shown,

IT IS HEREBY ORDERED that the hearing upon Petition for Order No. 301, heretofore set by continuance for
731 November 9, 1938, be continued until November 14, 1938 at 10:30 A. M., in the Court Room at New Haven.

ENTER:

C. C. HINCKS,
District Judge.

Dated at New Haven, Connecticut, this 25th day of October, 1938.

Statement of Objections of the Boston and Providence
732 **Railroad Corporation with Respect to Petition for Order No. 301.**

(Filed October 31, 1938.)

[SAME TITLE]

Now COMES Boston and Providence Railroad Corporation (hereinafter sometimes referred to as the Boston and Providence) by its counsel and states its objections with respect to the petition of Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, as Trustees of the

property of The New York, New Haven and Hartford Railroad Company and of Old Colony Railroad Company for Order No. 301 herein, as follows:

1. On August 4, 1938, the Provident Institution for Savings in the Town of Boston, a creditor of the Boston and Providence, filed its petition for reorganization of the Boston and Providence Railroad Corporation under Section 77 of the Bankruptcy Act as amended, in the District Court of the United States for the District of Massachusetts. Said petition was approved by said Court 734
by Order entered on August 5, 1938. By further Order of said Court entered on August 22, 1938, Bentley W. Warren and Charles W. Mulcahy were appointed Trustees of the estate of the Boston and Providence, and said appointments were ratified by Order of the Interstate Commerce Commission at a session held on October 8, 1938, notice of which ratification was received by said Trustees on October 17, 1938. Wherefore, the Boston and Providence no longer has title, possession or control over any of its properties or estate. Upon the filing and approving of said petition as aforesaid, the District Court of the United States for the District of Massachusetts 735
acquired exclusive jurisdiction of the Boston and Providence and of its property wherever located, which jurisdiction is complete and paramount, and exclusive of the jurisdiction of this Court over the person and/or property, or any part thereof, of the Boston and Providence. Accordingly, this Court has no jurisdiction to entertain the claim or claims upon which said Petition for Order No. 301 are founded against the Boston and Providence, or any of its properties.

2. The District Court of the United States for the District of Massachusetts, by virtue of said proceedings

now pending before it, has exclusive jurisdiction to determine the method by which all claims against the Debtor and its property therein shall be liquidated, including the claim or claims alleged in said Petition for Order No. 301, proof of which claim has been duly filed in said proceedings before the District Court of the United States for the District of Massachusetts in accordance with the Order of that Court entered August 22, 1938. Therefore, this Court has no jurisdiction over the subject matter of said Petition for Order No. 301, to the
737 extent that said petition has been brought for the purpose of establishing a liability against the Boston and Providence or its property, and to impose or enforce a lien thereon.

WHEREFORE, as a result of said proceedings now pending in the District Court of the United States for the District of Massachusetts, and of exclusive jurisdiction of said Court over the person and property of the Boston and Providence, and over the subject matter of said Petition for Order No. 301, it is submitted that the petitioners have failed to state a claim upon which relief can be
738 granted herein.

BOSTON AND PROVIDENCE RAILROAD CORPORATION
By JOHN NOBLE, JR.,
Attorney.

30 State Street,
Boston, Mass.

Dated: October 31, 1938.

739

Extracts from Minutes of Hearing Held on November 14, 1938, at 10:30 A. M., on Petition for Order No. 301, Petition of Trustees for a Charge upon the Earnings and Property of Boston and Providence Railroad Corporation for Administration for the Period June 4, 1936, to December 31, 1937.

[SAME TITLE]

Before:

HONORABLE CARROLL C. HINCKS,
District Judge.

740

APPEARANCES:

For the Trustees of the Property of The New York, New Haven and Hartford Railroad Company and of Old Colony Railroad Company:
W. W. MEYER, ESQ.,
H. H. CORBIN, ESQ.,

For Bankers Trust Company, Trustee under the First and Refunding Mortgage of the Principal Debtor:
COLONEL JOSEPH M. HARTFIELD,
FITZHUGH MCGREW, ESQ.,
STEWART H. JONES, ESQ.

741

For Bank of New York, as Trustee of the New England Railroad Consolidated Mortgage:
STUART N. SCOTT, ESQ.

For the Insurance Group:
MALCOLM FOOSHEE, ESQ.,
JOHN E. MASTEN, ESQ.

For Boston and Providence Railroad Corporation:
BENTLEY W. WARREN, ESQ., President (Special Appearance),
JOHN NOBLE, JR., ESQ. (Special Appearance).

Hincks, J.: We come to 301.

Mr. Meyer: Continued hearing on Petition for Order No. 301.

Hincks, J.: Will counsel state their appearances?

Mr. Warren: May it please your Honor, I appear not as counsel but as President of the Boston & Providence Railroad, specially to urge the objections filed on behalf of that corporation.

Hincks, J.: Any other appearances?

Mr. Noble: Your Honor, I also appear specially for the
743 Boston and Providence Railroad Corporation.

Colonel Hartfield: The Stenographer has my appearance.

Mr. Corbin: Mr. Meyer and H. H. Corbin for the Trustees of the property of the New Haven and of the Old Colony.

Hincks, J.: Any other appearances? (Pause.)

Mr. Fooshee: Malcom Fooshee for the Insurance Group.

Mr. Scott: Stuart N. Scott for the New England Trustee.

Hincks, J.: Is there no appearance for the Trustees of the Boston and Providence? (Pause.) The Trustees ap-
744 pear.

(Discussion off the record.)

Hincks, J.: Shall we proceed?

Mr. Corbin: If your Honor please, this hearing has been continued from time to time from August 9, 1938.

Hincks, J.: Let me first inquire whether there is pending any injunction that restrains the Trustees appointed by this Court from prosecuting this Petition. (Pause.) Are the Trustees advised that there is any injunction that purports to preclude their prosecution of this Petition? (Pause.)

Mr. Warren: May it please the Court, the Order of the Judge in the United States District Court for the Dis-

trict of Massachusetts in approving the Petition contains this, Ordered:

"2. That until further order, all persons, firms and corporations whatsoever, and wherever situated, located or domiciled, be and they hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties, or premises belonging to, or in the possession of the Debtor, Bos- 746
ton and Providence Railroad Corporation, or from interfering in any manner with the present operation of its railroad or properties or the carrying on of its business until the further order or orders of this Court."

Hincks, J.: Does that provide anything with respect to the operation of the property?

Mr. Warren: Nothing other than that, I think. Just one moment. (Pause.)

Hincks, J.: What is the position of the Trustees with respect to that Order?

Mr. Meyer: If your Honor please, it is the position of the Trustees that that Order is not applicable to the pro- 747
ceeding that is now pending in this Court. It appears to us that neither the words nor the spirit of the Order are applicable to this proceeding. This proceeding is for a determination by this Court of the amounts that the estate at this Court's direction has expended in the administration of the property of the Boston & Providence, and that this Court is the one and only Court that has the right and duty to determine those amounts.

Hincks, J.: It came to my attention that a show cause order issued from the Massachusetts Court more recently. Has there been any rule entered by the Court upon the show cause order?

Mr. Meyer: We are not informed of any rule, your Honor. At the conclusion of the hearing in Boston on the show cause order—I have here a copy of the transcript—the final remark of the Court at the conclusion of the argument is to this effect, "I am not, as I say, going to get in any race with the Connecticut Court to decide practically the whole question. That occured to me earlier in the discussion. I think you ought to present this to Judge Hincks so that he may know exactly what is going on. If Judge Hincks prefers that I decide it up
749 here, I will do it."

That was the conclusion of a discussion as to whether the question of jurisdiction raised by the Answer or statement of objections of the Boston & Providence would be decided in this Court, whether this Court would decide the matter if it were raised as it was raised by the Answer. And your Honor will recall that Mr. Wells conferred with your Honor on the matter, and, as a result of that, Judge Ford was advised—perhaps I might read the letter that Mr. Wells wrote to Judge Ford, with copies to Messrs. Warren, Mulcahy, and Noble.

"In accordance with your suggestion from the bench
750 today"—this is dated November 7— "at the hearing on the Boston & Providence Trustees' petition for an injunction, I reported to Judge Hincks that you wished to know whether he expects to pass upon the question of jurisdiction raised by the statement of objections filed by the Boston and Providence Railroad Corporation to our petition for Order No. 301 pending before him.

"He stated that he sees no escape from his passing upon that question. As I stated to you at the hearing this morning, the hearing before Judge Hincks is set for next Monday, November 14th."

Since that time, we have heard nothing either from

Judge Ford or from the Trustees of the Boston & Providence.

Hincks, J.: Then let us proceed with the Petition.

* * * * *

Mr. Meyer: It may be worthwhile calling your attention to the fact that both of the Trustees of the Boston & Providence are here present in Court and may wish to make some representation.

Hincks, J.: I have given them ample opportunity to note their presence for the record. I assume from their 752
silence that that is not desired. (Pause.) I confess I am a little puzzled to know why three times the Boston & Providence should have asked for a continuance of this hearing in order that the Trustees might be represented, when after this long delay, which I supposed was in the interests of justice, the Trustees do not care to note their presence. However, we will leave the record as it is and proceed to consider the question on the merits. It appears to me that on the question of jurisdiction, the Boston & Providence has the burden of going forward with argument.

753

Memorandum of Decision on Jurisdictional Objections to Petition for Order No. 301.

[SAME TITLE]

A proper appraisal of the jurisdictional objections raised by Boston and Providence Railroad Corporation (hereinafter referred to as B P) requires a statement of facts which includes a review of certain phases of the

proceedings heretofore had in this matter. Such a statement I find accurately set forth in the brief of the Old Colony trustees which I borrow for purposes of this memorandum. It is as follows:

Upon approval on October 23, 1935, of the petition of the New Haven for reorganization there came into the custody of this Court not only the property owned by the New Haven but also the property which it had leased in 1893 from the Old Colony, including the property of the
755 Boston and Providence which Old Colony had leased from that Company in 1888. By its initial order (R., p. 5) this Court provided, *inter alia*, for continued operation of the railroad subject to such supervision and control as the Court might exercise by further orders and for payment of all necessary current operating expenses. The order enjoined all interference with all property "belonging to, or in the possession of" the New Haven (R., p. 11). Thereafter, upon hearing duly noticed (R., p. 13) Trustees were appointed (R., p. 85) and upon their qualification entered upon the administration and operation of the property, including the property of the Boston and Provi-
756 dence in which the New Haven had a subleasehold estate.

On June 2, 1936, the New Haven Trustees rejected the Old Colony lease (R., p. 721) and the next day the Old Colony petitioned (R., p. 731) for reorganization herein and requested that the New Haven Trustees continue to operate the property of Old Colony. This petition was approved (R., p. 747) and after hearing duly noticed (R., p. 750) this Court by Order No. 75 (R., p. 875) appointed the same persons who were acting as Trustees of the property of the New Haven as Trustees also of the property of the Old Colony. The order provided, however, that until further order of the Court the property of Old Colony should be operated by the New Haven

Trustees as an integral part of the system. This property, including the property of the Boston and Providence in which the Old Colony had a leasehold estate, has continued to be operated by the New Haven Trustees to the present time.

By paragraph 2, subparagraph (c), of Order No. 75 the New Haven Trustees were empowered and authorized to pay such sums as might be necessary to comply with the obligations of Old Colony under contracts or leases, subject however to the direction that such payments should 758
not constitute affirmation of such contracts or leases or any of them, and by paragraph 7 of said Order it was provided that said Trustees, either as such or as Old Colony Trustees, should not intentionally make or permit any default in the performance of any contract or lease to which Old Colony was a party unless and except upon the advice and with the consent of the Court previously obtained after hearing duly noticed. By paragraph 9 of said Order the Old Colony Trustees were authorized at any time prior to November 15, 1936, or prior to such other day as might be provided by further order of the Court, and with the advice and consent of the Court after 759
hearing duly noticed, to reject any of the existing contracts or leases of Old Colony; and it was further provided in said paragraph 9 that the performance by Old Colony, by the Old Colony Trustees or by the New Haven Trustees for the account of Old Colony, of such contract or lease within said period or future periods allowed for rejection should not constitute or be evidence of the adoption or acceptance of such contract or lease by Old Colony or by the Old Colony Trustees, or the waiver of the right to disaffirm or reject the same, and that in case payments were made pursuant to the authority granted by the terms of said order or of any other order in the proceeding, to

comply with the obligations of Old Colony under leases and such leases should be subsequently disaffirmed or rejected by Old Colony or by the Old Colony Trustees or under a plan of reorganization, "the operation of the leased properties shall have been and said payments shall be deemed to have been made for the account of the lessor, and such paymnt shall be recovered, set-off, or made and charged, on the earnings and properties of the lessor, prior to any mortgage or other lien thereon by such
761 method as the Court shall determine, and further reserving all rights and equities of the parties arising from such payments." The provisions that payments under leases should not constitute affirmation of such leases and for charging the earnings and properties of the lessor in case of subsequent rejection for the operation of the leased properties and said payments were similar to provisions previously entered with respect to leases under which the New Haven was lessee (Order No. 1, R., p. 5; Order No. 17, R., p. 131).

The Boston and Providence, its officers, agents and counsel have had knowledge of the terms of Order No. 75
762 continuously since its entry (Exh. 6 on hearing on Trustees' Report of Administration, June 2, 1938). On May 25, 1937, the Boston and Providence asked leave to intervene generally herein (R., p. 2635) and two days later their petition was granted (R., p. 2643). On April 19, 1938, the Trustees, having been directed by the Court so to do, filed herein a report of administration of the property of Old Colony and Providence, Warren & Bristol Railroad Company up to and including December 31, 1937 (R., p. 4221). By Order No. 300 entered July 18, 1938 (R., p. 4593) the Court approved the accounts as stated in that report in the amount of $11,789,730.22 (R., p. 4594) which amount included $3,955,298.93, pur-

ported to cover administration of the property of the Boston and Providence for the period June 4, 1936, to December 31, 1937, both dates inclusive. The Boston and Providence actively participated at the hearing on this report and the Court on its petition (R., p. 4529) held a supplemental hearing respecting these accounts.

On July 19th the Court entered Order No. 217 (R., p. 4597), directing the Old Colony Trustees to reject the Boston and Providence lease, and providing among other things as follows: 764

> "3. Pending further order of Court the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision (c) (6) of Sec. 77 of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate.
>
> "The Court reserves for further hearing the right to determine the existence and amount of any obligation of Boston and Providence arising out of operation of its property or payments made to it or on its behalf prior to the rejection of its lease, and the liability of the Boston and Providence therefor to the Old Colony estate and by way of subrogation to the New Haven estate. And pending such determination the Court will withhold its final ruling on Petition for Order No. 276." 765

On the same day the Old Colony Trustees did reject the Boston and Providence lease (R., pp. 4601, 4602).

766 *Memorandum of Decision on Jurisdictional Objections to Petition for Order No. 301.*

On July 27, 1938, the Old Colony and New Haven Trustees filed their Petition for Order No. 301 (R., p. 4621). In their petition they referred to Order No. 300 (R., p. 4593) reported that the sum charged against the earnings and property of Old Colony included $3,955,298.93 covering payments made under the Boston and Providence lease and expenditures incurred in the administration of the property described in that lease during the period from June 4, 1936 to December 31, 1937, both
767 dates inclusive, and asked the Court to approve the account against the Boston and Providence in that amount and order that it

> "constitute a lien and charge on the earnings and property of Boston and Providence Railroad Corporation in the possession of this Court prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said Company as an expense of administration of said property of said Company by the Trustees of the property of the Principal Debtor herein on behalf and for the account of the
> 768 Trustees of the property of Old Colony Railroad Company, and may be recovered by said Trustees of the property of Old Colony Railroad Company or, in the alternative, by the Trustees of the property of the Principal Debtor out of the earnings and property of said Boston and Providence Railroad Corporation by such method as the Court shall hereafter determine, and that to the extent that said amount is so recovered by said Trustees of the property of the Principal Debtor the like charge against the earnings and property of Old Colony Railroad Company heretofore allowed by Order No. 300 shall be correspondingly reduced, and that the Court reserve for later

determination the amount of like charges covering administration of the property of said Boston and Providence Railroad Corporation from January 1, 1938, to the date of rejection of the aforesaid lease."

On August 4, 1938, the Provident Institution for Savings, a creditor of the Boston and Providence, filed a petition for reorganization of the latter under Sec. 77 of the Bankruptcy Act in the District Court of the United States for the District of Massachusetts. The petition recited 770
that the Boston and Providence lease had been rejected and that this Court had ordered that pending its further order the operation of the property of the Boston and Providence for the account of that company should be continued pursuant to subdivision (c) (6) of Section 77 of the Bankruptcy Act.

The Boston and Providence filed an answer to this petition admitting the material allegations therein. The petition was approved by the Massachusetts Court on August 5, 1938, the order enjoining all persons wherever situated from "interfering in any manner with the present operation of its (the Boston and Providence) railroad or 771
properties or the carrying on of its business."

On August 6, 1938, Bankers Trust Company, as Trustee under the New Haven First and Refunding Mortgage, filed an answer herein to Petition for Order No. 301 (R., p. 4663), joining in the prayer and asking for further relief.

The Massachusetts Court appointed Messrs. Warren and Mulcahy as Trustees of the B P estate, and pending the ratification of these appointments, the hearing on Petition for Order No. 301, originally set for August 9, 1938, was several times continued at the request of B P in order that Trustees of B P fully qualified might have an oppor-

tunity to appear. However, when Petition for Order No. 301 finally came on for hearing the B P Trustees, though present in person declined to appear on record, and counsel for the B P debtor corporation pressed a written statement of objections to the jurisdiction of the Court to entertain Petition for Order No. 301.

Section 77 (a) provides:

> "If the petition is so approved, the court in which
773 such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district."

774 Under this provision, the Massachusetts Court acquired a jurisdiction over the estate of the B P which is stated to be "exclusive." And there is an abundance of cases enunciating the proposition that in such a conflict as is here disclosed the jurisdiction of a court having a paramount jurisdiction under the Bankruptcy Act will supersede the jurisdiction of a court which is not a Court of Bankruptcy. See *Gross* v. *Irving Trust Company*, 289 U. S. 342. If the Connecticut Court had been operating B P property through an equity receivership, unquestionably its jurisdiction to ascertain and assess operating deficits would have terminated upon the intervention of the Massachusetts proceeding under Section 77.

But under the same provision of Section 77(a), this Court acquired a jurisdiction over the estate of the New Haven which was also "exclusive." And the estate of the New Haven included a leasehold interest in B P. As successors to the lessees under the B P lease, the New Haven trustees were required to possess and operate the B P property. This responsibility, I hold, survived the rejection of the B P lease and the subsequent intervention of the Massachusetts proceeding for the reorganization of B P under Section 77. Indeed, the propriety of this 776
holding was recognized by the Massachusetts Court itself which, in the order approving the petition for the reorganization of B P, enjoined interference with the "present operation of" B P property, *i. e.*, the operation by the New Haven trustees. Apparently, nothing short of a proper petition for the repossession of B P properties proposing operation thereof by the B P trustees in reorganization, on the one hand, or an authorization of abandonment pursuant to Section 77(c) (6), on the other hand, can serve to relieve the New Haven trustees of their responsibility to carry on.

The persistence of this duty of the New Haven trustees 777
is clearly implied from the provisions of Section 77(c) (6). Also it was such a duty as devolved upon receivers in equity proceedings for the reorganization of railroad properties, *Quincy R. Co* v. *Humphreys,* 145 U. S, at 98; *American Brake Shoe and Foundry Co.* v. *N. Y. Rys. Co.,* 282 Fed. 523, at 528, and thus devolved upon trustees under Section 77 under the provision of subdivision (c) (2) of that Act whereby the trustees if authorized by the judge (as they were here) are vested with "all the powers of a receiver in an equity proceeding." Thus the exclusive jurisdiction of this Court over New Haven and Old Colony properties has carried with it by operation of law

the duty through its trustees to possess and operate B P property and a jurisdiction at least commensurate with that duty.

The grant, as well as the measure, of that jurisdiction is contained in the extract from Section 77(a) above quoted, viz., "all the powers, not inconsistent with this section, which a Federal Court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose." Thus the grant included a juris-
779 diction, as broad as that of a court having primary or domiciliary jurisdiction over an equity receivership, to ascertain the operating deficits of a leased line incurred while operated by its receiver, even though the lessor thereof was in receivership elsewhere, and to assess such deficits against the leased property. *Ames* v. *Union Pac. Ry. Co.*, 60 Fed. 966, at 974; Idem, 74 Fed. 335; *Penn Steel Co.* v. *N. Y. City Ry. Co.*, 225 Fed. 734; Idem, 176 Fed. 467.

The inclusion of such a power in the grant of jurisdiction is not inconsistent with Section 77. On the contrary, it dovetails perfectly into the legislative scheme. It is in
780 essence but one manifestation of the power to issue trustees' certificates expressly lifted from equity practice into Section 77 by subdivision (c) (3) thereof. Indeed, if and in so far as this court has authorized the operation of B P property at a loss, its action was merely tantamount to authority to the Old Colony trustees, who were principally charged with the duty to operate but were without the necessary means, to sell their certificates to the New Haven estate coupled with reciprocal authority to the New Haven to purchase such certificates. Furthermore, the power upon a dismissal of the proceedings to condition the surrender of property upon terms adapted to protect obligations incurred by the trustees is expressly provided

by subdivision (i) of the Act. Yet such a power is but the exercise at a possible later stage in the proceedings of the power now challenged. And why should Congress have provided in subdivision (c) (10) for a "segregation and allocation * * * of earnings and expenses between and to the divisions and parts of the railroad * * * separately subject to liens * * * or separately subject to lease" unless it had contemplated that in the course of the proceedings the court would give effect to such segregation and allocation? Obviously, if a deficit allocable to 782
a leased line is not charged against that property, the court is without means to assure to other divisions of the system owned by the debtor earnings found to be properly allocable thereto.

And so it seems clear that this court, as an incident to its duty to operate B P property, originally acquired jurisdiction to ascertain and assess any deficits resulting from such operation against the property and that this power, still as an incident to the duty, survived the rejection of the B P lease.

Thus we are brought to the question whether the power similarly survived the intervention of the Massachusetts 783
proceeding. As to this, I hold that it did and base my conclusion upon two grounds.

First. The text of the Act, in the light of its legislative history, discloses a legislative intent that the power of this court to impose liens against B P property should cover all operations of that property by the trustees of this court which were so conducted under a duty to operate. To be sure, the grant of "exclusive jurisdiction," if viewed for its relation only to the Massachusetts court, suggests a legislative intent contrary to my conclusion. But this suggestion is cancelled by the corresponding inference from the grant of the same "exclusive" jurisdic-

tion to this court. Consequently we must look elsewhere in the Act for clues as to the legislative intent. Thus I come to subdivision (c) (6) of Section 77. Clearly "the judge" referred to in this paragraph is the judge of the court having jurisdiction over the lessee and its estate. Under this paragraph, in the absence of a prior demand by the lessor's trustees for repossession (for such a demand if authorized by the Massachusetts court would doubtless terminate the duties of the New Haven trustees
785 to continue operations) it lies within the power of this court to determine whether the duty of operating the lessor's property shall rest upon the lessor (or its trustees) or upon the lessee (or its trustees) for the lessor's account. The paragraph contemplates a situation in which "it would be impracticable and contrary to the public interest for the lessor to operate the said line." Clearly Congress had in mind the possibility of a lessor which for lack of available funds or competent operating organization could not perform its obligation to the public; in other words, a lessor which was eligible for reorganization. The grant of power to the court having jurisdiction over
786 the lessee to fix the incidence of the burden of operation as between the lessee and a lessor eligible for reorganization under another court of bankruptcy, surely points to an intent that the jurisdiction of the former to ascertain and assess deficits resulting from the operation of its trustees shall survive irrespective of the intervention of proceedings elsewhere for the reorganization of the lessor.

Under Section 77 (c) (3), as noted above, this Court was given a jurisdiction which clearly included the power by the sale and issue of trustees' certificates to raise funds required to perform its obligation to the public to operate the B P property. There being nothing in the grant of this power and nothing in the Act to indicate that this

power was to terminate upon the intervention of proceedings elsewhere, this power must be deemed to survive. That being so, the cognate power of this Court to assess operating deficits likewise must be deemed to survive.

Section 77 (i) provides that a court dismissing a proceeding under Section 77 may transfer the debtor's assets to receivers or trustees appointed "prior or subsequent to the institution of a proceeding under this section * * * *upon such terms as the court in the proceeding under this section may deem equitable for the protection of the obli-* 788 *gations incurred by any trustee or trustees appointed under this section.*" If this court is thus empowered to safeguard the obligations of its trustees upon a dismissal of the proceedings, it can scarcely be inferred that Congress intended more narrowly to circumscribe the power of the court to safeguard the obligations of its trustees with respect to property still remaining in their sole possession for the continued operation of which they are currently responsible.

The legislative history of Section 77 as well as every consideration of common sense supports this uncovering of the legislative intent. Through its trustees this court 789 has been operating under leases rejected in these proceedings, as integral parts of the New Haven system, lines of lessors two of which are domiciled in Connecticut, one in Rhode Island, and two in Massachusetts, omitting reference to other leases not rejected. Legally each of these lessors was as well entitled as B P to reorganize in the jurisdiction of its domicil. Had this occurred, the suggestion that the accounting for the operations by the New Haven trustees should be had not in the court of their appointment but in numerous courts elsewhere would be directly at variance with the Congressional intent that Section 77 should furnish a more simply coordinated ar-

rangement for the reorganization of railroad systems and for their operation pending reorganization, than the device of the equity receivership with its multiplicity of ancillary receivers. If accepted, the suggestion would tend greatly to foment conflicts between coordinate courts and compel creditors, in the protection of their interests, to ride the circuit, demonstrating the basis of their positions in successive courts. Surely such a state of affairs would not constitute the intended improvement over the
791 practice in equity receiverships, wherein the task of ascertaining charges and assessing liens had been consolidated, as we have seen, in the court of primary jurisdiction.

B P seems in part to rely upon certain language contained in Section 77 (i) which provides for transfers of title to a debtor or to the trustees of its estate from "a receiver or trustee of all or any part of" the debtor's property appointed "by a Federal or State court." Certainly this court never purported to appoint receivers or trustees for B P or any part of its property. It appointed trustees for the New Haven estate to operate the New Haven system which then comprised a leasehold interest in B P.
792 Thus these provisions of Section 77 (i) are seen to have no application to the situation here involved. No one questions the title of the B P trustees, or their right to obtain possession as soon as they are in a position to operate.

But even if the trustees of this court by reason of their possession and operation of B P property could be deemed to have been appointed as trustees of B P property, I could not properly construe Section 77 (i) to oust this court of jurisdiction. For as was observed with respect to the analogous provision in Section 77B (see 77B[i]), in *DuParquet, Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, Section 77B was enacted as an improvement over

reorganization proceedings in equity and hence was held as not intended to mean that the jurisdiction of a bankruptcy court under Section 77B should supersede the jurisdiction of a prior *foreclosure* receivership. By a parity of reasoning, by Section 77 (i) it was intended only that the jurisdiction of a court under Section 77 should supersede prior reorganization proceedings in equity—not the jurisdiction which a coordinate court of bankruptcy had acquired but not exhausted also under Section 77. Indeed this intent is further evidenced by the provision 794 of subdivision (i) which authorizes a court having jurisdiction of reorganization proceedings upon the dismissal of the proceedings, "to transfer possession of the debtor's property *within the territorial jurisdiction of such Federal or State Court* to the prior receiver or trustee." Thus this provision is seen to be directed to the relation between courts under Section 77 and courts whose jurisdiction is subject to a territorial limitation as distinguished from courts of bankruptcy which under Section 77 (a) have "exclusive jurisdiction of the debtor and its property *wherever located.*"

Something is said in the briefs about Section 67 (f) 795 of the Bankruptcy Act. I cannot see that this Section has any applicability to the question of jurisdiction. If, at a later stage, either here or in Massachusetts, B P shall contend that Section 67 (f) has efficacy to invalidate a claim of lien asserted by the Old Colony trustees, then will be the proper time for the entry of an appropriate ruling.

Nor is Section 77 (j) helpful to the present contentions of B P. To be sure, when Petition for Order No. 301 was originally filed before the intervention of the Massachusetts proceedings, it included a prayer for relief contemplating enforcement by this Court. But in view of the

pendency of the Massachusetts proceedings, this prayer has now been disclaimed by Old Colony trustees. With this limitation by disclaimer, the petition contains nothing inconsistent with such power as the Massachusetts Court may have under Section 77 (j) to prevent the *enforcement* of liens which may be adjudicated by this Court. As to the presence or dimensions of such power, there is no need now to express an opinion.

Second. Even if there were a complete absence of evi-
797 dence of the legislative intent in the text and history of the Act, my holding would still be required. For we are now concerned with a conflict between two coordinate courts of concurrent, overlapping jurisdiction, neither belonging to a class which by paramount law is categorically given a jurisdiction over the particular subject matter paramount to the jurisdiction of the other.

In such cases, it has long been settled that "where a court of competent jurisdiction has, by appropriate proceedings, taken property into possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. *Wabash R. R. Co.* v. *Adelbert*
798 *College*, 208 U. S. 38, 54. Compare *Oklahoma* v. *Texas*, 258 U. S. 544, 581. Possession of the *res* disables other courts of coordinate jurisdiction from exercising any power over it. *Farmers' Loan and Trust Co.* v. *Lake Street Elevated R. R. Co.*, 177 U. S. 51, 61. The court which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies relating thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other court to interfere with such possession and jurisdiction. *Palmer* v. *Texas*, 212 U. S. 118, 126, 129." *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77. See also

Lake Superior Iron Co. v. *Brown, Bonnell & Co.*, 44 Fed. 539, affirmed 141 U. S. 475; *Lang* v. *Choctaw R. Co.*, 160 Fed. 355; *Berg* v. *Fidelity & Casualty Co.*, 274 Fed. 311; *Sullivan* v. *Algren*, 160 Fed. 366; *Mound City Co.* v. *Castleman*, 187 Fed. 921, appeal dismissed 235 U. S. 689; *U. S.* v. *Sterling*, 291 Fed. 695.

The jurisdictional objections of B P must accordingly be overruled. B P, or its trustees if they so desire may have until January 21st to file objections to the merits of the petition as provided by my order of October 20, 1938, and the petition may stand assigned for hearing on the merits on January 30th, 1939, at New Haven, at 10.30 A. M.

ORDERED ACCORDINGLY.

Dated at New Haven this 16th day of January, 1939.

C. C. HINCKS,
United States District Judge.

Order Providing for Hearing on the Merits of Petition for Order No. 301.

[SAME TITLE]

This Court having heretofore, on January 16, 1939, entered its order overruling the jurisdictional objections to Petition for Order No. 301 herein, and the Court being advised that the Trustees of the property of Boston and Providence Railroad Corporation have been authorized by the District Court of the United States for

the District of Massachusetts, the Court of their appointment, to oppose said Petition, it is ORDERED:

1. That said Boston and Providence Trustees may file their specific objections to the merits of said Petition for Order No. 301 on or before March 13, 1939, and shall provide copies thereof to counsel who have heretofore appeared at hearings on said Petition.

2. That thereafter, and on April 3, 1939, at 11:00 A. M.,
803 at New Haven, Connecticut, this Court will hold a hearing on the merits of said Petition.

3. That petitioners be and they hereby are directed to give notice of this order by timely mailing copies of this order to each of said Boston and Providence Trustees and to all others who are customarily notified of hearings in these proceedings.

ENTER:

C. C. HINCKS,
District Judge.

Dated: February 13th, 1939.

804

Petition of Bentley W. Warren and Charles W. Mulcahy, Trustees, for Leave to Intervene.

(Filed February 14, 1939.)

[SAME TITLE]

PETITION FOR ORDER NO. 344.

Now come Bentley W. Warren and Charles W. Mulcahy, Trustees of the property of Boston and Providence Railroad Corporation, and respectfully represent:

Petition of Bentley W. Warren and Charles W. Mulcahy, Trustees, for Leave to Intervene. 805

1. That by Order of this Court entered January 16, 1939, jurisdictional objections of Boston and Providence Railroad Corporation to Petition for Order No. 301 herein were overruled.

2. That by Order of the District Court of the United States for the District of Massachusetts entered on January 31, 1939, petitioners were authorized to enter their special appearance in the above entitled proceedings for the limited purpose of joining in and prosecuting an appeal from said Order of this Court overruling said jurisdictional objections and of defending against the claims set forth in said Petition for Order No. 301. 806

WHEREFORE your petitioners respectfully pray that an order be entered:

1. Granting leave to the petitioners to file this petition;

2. Granting leave to the petitioners to intervene specially in the above entitled proceedings for the limited purpose of joining in and prosecuting an appeal from the Order of this Court overruling jurisdictional objections to Petition for Order No. 301 in these proceedings, and without waiving said jurisdictional objections, of defending against the claims contained in said Petition for Order No. 301. 807

BENTLEY W. WARREN
CHARLES W. MULCAHY
Trustees of the property of
BOSTON AND PROVIDENCE RAILROAD CORPORATION
By BENTLEY W. WARREN
Trustee

Dated: February 13, 1939.

(Verification omitted in printing.)

808

Order Permitting Special Intervention of Trustees of Boston and Providence Railroad Corporation.

[SAME TITLE]

ORDER No. 344.

Upon consideration of the petition of Bentley W. Warren and Charles W. Mulcahy, Trustees of the property of Boston and Providence Railroad Corporation, for leave
809 to intervene specially herein, it is

ORDERED: that Bentley W. Warren and Charles W. Mulcahy, as Trustees of the property of Boston and Providence Railroad Corporation, be and they hereby are permitted to intervene specially herein, and are hereby admitted and constituted as a party to these proceedings, for the limited purpose of joining in and prosecuting an appeal from the decision and order of this Court entered January 16, 1939, overruling jurisdictional objections to Petition for Order No. 301 herein, and of defending against the claims contained in said Petition for Order
810 No. 301.

ENTER:

C. C. HINCKS,
United States District Judge.

New Haven, Connecticut,
February 14, 1939.

811

Notice of Appeal.

[SAME TITLE]

Notice is hereby given that Boston and Providence Railroad Corporation and Bentley W. Warren and Charles W. Mulcahy, as Trustees of the property of Boston and Providence Railroad Corporation, hereby appeal to the Circuit Court of Appeals for the Second Circuit from the Order overruling jurisdictional objections of Boston and Providence Railroad Corporation to Petition for Order No. 301 entered in these proceedings on January 16, 1939. 812

BOSTON AND PROVIDENCE RAILROAD CORPORATION

By DONALD C. STARR
Counsel

BENTLEY W. WARREN
CHARLES W. MULCAHY
Trustees of the Property of Boston and Providence Railroad Corporation

By BENTLEY W. WARREN 813
Trustee

Dated: February 13th, 1939.

Petition for Appeal.

[SAME TITLE]

Now come Boston and Providence Railroad Corporation, and Bentley W. Warren and Charles W. Mulcahy, Trustees of the property of Boston and Providence Railroad Corporation under their special intervention herein for the purpose of taking this appeal, and, considering themselves aggrieved by the decision and order of this Court dated and entered herein on the sixteenth day of January, 1939, upon the jurisdictional objections to Petition for Order No. 301 herein, do hereby petition for an appeal from said decision and order to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the Assignment of Errors filed herewith, and pray that this appeal may be allowed and that a citation be issued as provided by law, and that a transcript of the record, proceedings, and papers upon which said decision and order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit under the rules of said Court in such case made and provided.

BENTLEY W. WARREN
CHARLES W. MULCAHY
Trustees of the property of
BOSTON AND PROVIDENCE RAILROAD CORPORATION
By BENTLEY W. WARREN
Trustee

Dated: Boston, Massachusetts,
February 13, 1939.

BOSTON AND PROVIDENCE RAILROAD CORPORATION
By DONALD C. STARR
Counsel

(Verification omitted in printing.)

817

Order Allowing Appeal.

[SAME TITLE]

Upon due consideration of the Petition of Boston and Providence Railroad Corporation and the Trustees of the property of Boston and Providence Railroad Corporation, dated February 13, 1939, for the allowance of an appeal to the United States Circuit Court of Appeals for the Second Circuit from the decision and order of this Court entered herein on January 16, 1939, upon the jurisdictional objections to Petition for Order No. 301, together with the Assignment of Errors filed with said petition, it is

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ORDERED that said petition be and it hereby is granted, and that the appeal to the United States Circuit Court of Appeals for the Second Circuit, as prayed for in said petition, is hereby allowed, and that a certified copy of a transcript of the record, exhibits and documents relating to said jurisdictional objections and of all proceedings had in connection therewith be forthwith transmitted to the United States Circuit Court of Appeals for the Second Circuit, and that such other proceedings be had as may be proper, and it is further

819

ORDERED that the bond for costs of such appeal is fixed in the sum of $250, and the bond in said sum filed herein is hereby in all respects approved.

ENTER:

C. C. HINCKS,
United States District Judge.

Dated at New Haven, Connecticut,
February 14th, 1939.

820 **Assignment of Errors re Decision and Order Overruling Jurisdictional Objections to Petition for Order No. 301.**

[SAME TITLE]

The appellants, Boston and Providence Railroad Corporation and Bentley W. Warren and Charles W. Mulcahy, Trustees of the property of Boston and Providence Railroad Corporation, file the following Assignment of Errors and say that the decision and order made and entered by this Court in the above entitled proceedings on January 16, 1939, upon the jurisdictional objections to
821 Petition for Order No. 301, was and is erroneous for the following reasons:

1. The Court erred in overruling the objection that it has no jurisdiction over the person and property, or any part thereof, of Boston and Providence Railroad Corporation.

2. The Court erred in overruling the objection that it has no jurisdiction to entertain the claims upon which Petition for Order No. 301 are based against Boston and Providence Railroad Corporation, or any of its properties.

822 3. The Court erred in overruling the objection that it has no jurisdiction over the subject matter of Petition for Order No. 301 to the extent that said petition has been brought for the purpose of establishing a liability against Boston and Providence Railroad Corporation or its property, and to impose or enforce a lien thereon.

4. The Court erred in overruling the objection that Petition for Order No. 301 fails to state a claim upon which relief can be granted.

5. The Court erred in ruling that, "as an incident to its duty to operate Boston and Providence property, (it) originally acquired jurisdiction to ascertain and assess any deficits resulting from such operation against the property," and in its ruling that "this power, still as an

823

incident to the duty, survived the rejection of the Boston and Providence lease."

6. The Court erred in its ruling that it has jurisdiction to ascertain and assess any deficits against the Boston and Providence property resulting from operation of the property, subsequent to the institution of the proceedings in the District Court of the United States for the District of Massachusetts for the reorganization of the Boston and Providence Railroad Corporation.

824

7. The Court erred in failing to hold applicable to the issues presented by the jurisdictional objections to Petition for Order No. 301, the provisions of Section 23 (b) of the Bankruptcy Act as amended, governing jurisdiction over suits instituted by trustees.

8. The Court erred in failing to require the Trustees of Old Colony Railroad Company and of The New York, New Haven and Hartford Railroad Company to prosecute their claims against Boston and Providence Railroad Corporation and its property in the District Court of the United States for the District of Massachusetts, in the proceedings in that court for the reorganization of Boston and Providence Railroad Corporation.

825

9. The Court erred in ruling that the District Court of the United States for the District of Massachusetts does not have paramount jurisdiction over the subject matter of Petition for Order No. 301.

10. The Court erred in ruling that it has, by appropriate proceedings, taken possession of the property of Boston and Providence Railroad Corporation through its (the court's) officers.

11. The Court erred in ruling that the possession of the property of Boston and Providence Railroad Corporation by the Trustees of The New York, New Haven and

Hartford and Old Colony Railroad Companies, conferred jurisdiction upon the court over said property of Boston and Providence Railroad Corporation.

12. The Court erred in ruling that possession of the property of Boston and Providence Railroad Corporation vests in its power to hear and determine all controversies relating thereto.

13. The Court erred in ruling that its possession of the property of Boston and Providence Railroad Corporation withdraws that property from the jurisdiction of all other courts and disables other courts from exercising any power over it.

14. The Court erred in failing to rule that exclusive jurisdiction to determine the claims contained in Petition for Order No. 301 and to grant the relief therein prayed for is vested in the District Court of the United States for the District of Massachusetts.

WHEREFORE, the appellants pray that said order dated and entered herein on January 16, 1939, upon jurisdictional objections to Petition for Order No. 301 be reversed for the reasons above stated, and for such other and further relief as to the Court may seem just and proper.

BOSTON AND PROVIDENCE RAILROAD CORPORATION

By DONALD C. STARR
Counsel

BENTLEY W. WARREN
CHARLES W. MULCAHY
Trustees of the Property of Boston and Providence Railroad Corporation

By BENTLEY W. WARREN
Trustee

Dated: February 13, 1929
30 State Street
Boston Massachusetts

829

Citation.

[SAME TITLE]

BY THE HONORABLE CARROLL C. HINCKS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT IN THE SECOND CIRCUIT,

To Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Howard S. Palmer, James L. Loomis and Henry B. Sawyer, Trustees of the property of Old Colony Railroad Company, Bankers Trust Company, Trustee under the First and Refunding Mortgage of The New York, New Haven and Hartford Railroad Company, James H. Brewster, Jr., Harry C. Hagerty, Gladden W. Baker, Haughton Bell, Fred T. Hayward and Alfred H. Meyers, as they constitute a committee representing a "group of insurance companies acting to protect their interests in the securities of The New York, New Haven and Hartford Company system," Bank of New York and Trust Company, Trustee under the New England Railroad Company Consolidated Mortgage dated September 2nd, 1893, Protective Committee of the Shareholders of Old Colony Railroad Company, now consisting of George Peabody Gardner, Jr., et al., Old Colony Railroad Company, and Old Colony Trust Company, Trustee under the Indenture and Deed of Trust of Old Colony Railroad Company dated January 30th, 1924.

830

831

GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for

832 *Statement by Appellants of Points on Which They Intend to Rely on Appeal.*

the Second Circuit to be holden in the Borough of Manhattan in the City of New York in said Circuit thirty days from the date hereof pursuant to an appeal filed in the Office of the Clerk of the United States District Court for the District of Connecticut, wherein Boston and Providence Railroad Corporation and Bentley W. Warren and Charles W. Mulcahy, as Trustees of the property of Boston and Providence Railroad Corporation, are appellants and you are appellees, to show cause, if any there be,
833 why the order of January 16, 1939, in said cause should not be corrected and why speedy justice should not be done in that behalf.

GIVEN under my hand in the City of New Haven, in the District and Circuit above named, this 14th day of February, 1939.

C. C. HINCKS,
United States District Judge.

834 **Statement by Appellants of Points on Which They Intend to Rely on Appeal.**

[SAME TITLE]

The Appellants, Boston and Providence Railroad Corporation, and Bentley W. Warren and Charles W. Mulcahy as Trustees of the property of Boston and Providence Railroad Corporation, submit the following statement of the points on which they intend to rely on their appeal from the decision and order entered herein on

Statement by Appellants of Points on Which They Intend to Rely on Appeal. 835

January 16, 1939, upon the jurisdictional objections to Petition for Order No. 301:

Point No. 1—The Court erred in overruling the objection that it has no jurisdiction over the person and property, or any part thereof, of Boston and Providence Railroad Corporation.

Point No. 2—The Court erred in overruling the objection that it has no jurisdiction to entertain the claims 836
upon which Petition for Order No. 301 are based against Boston and Providence Railroad Corporation, or any of its properties.

Point No. 3—The Court erred in overruling the objection that it has no jurisdiction over the subject matter of Petition for Order No. 301 to the extent that said petition has been brought for the purpose of establishing a liability against Boston and Providence Railroad Corporation or its property, and to impose or enforce a lien thereon.

837

Point No. 4—The Court erred in overruling the objection that Petition for Order No. 301 fails to state a claim upon which relief can be granted.

Point No. 5—The Court erred in ruling that, "as an incident to its duty to operate Boston and Providence property, (it) originally acquired jurisdiction to ascertain and assess any deficits resulting from such operation against the property," and in its ruling that "this power, still as an incident to the duty, survived the rejection of the Boston and Providence lease."

Point No. 6—The Court erred in its ruling that it has jurisdiction to ascertain and assess any deficits against

the Boston and Providence property resulting from operation of the property, subsequent to the institution of the proceedings in the District Court of the United States for the District of Massachusetts for the reorganization of the Boston and Providence Railroad Corporation.

Point No. 7—The Court erred in failing to hold applicable to the issues presented by the jurisdictional objections to Petition for Order No. 301, the provisions of
839 Section 23(b) of the Bankruptcy Act as amended, governing jurisdiction over suits instituted by trustees.

Point No. 8—The Court erred in failing to require the Trustees of Old Colony Railroad Company and of The New York, New Haven and Hartford Railroad Company to prosecute their claims against Boston and Providence Railroad Corporation and its property in the District Court of the United States for the District of Massachusetts, in the proceedings in that court for the reorganization of Boston and Providence Railroad Corporation.

840 *Point No. 9*—The Court erred in ruling that the District Court of the United States for the District of Massachusetts does not have paramount jurisdiction over the subject matter of Petition for Order No. 301.

Point No. 10—The Court erred in ruling that it has, by appropriate proceedings, taken possession of the property of Boston and Providence Railroad Corporation through its (the court's) officers.

Point No. 11—The Court erred in ruling that the possession of the property of Boston and Providence Railroad Corporation by the Trustees of The New York, New Haven and Hartford and Old Colony Railroad Companies,

conferred jurisdiction upon the court over said property of Boston and Providence Railroad Corporation.

Point No. 12—The Court erred in ruling that possession of the property of Boston and Providence Railroad Corporation vests in it power to hear and determine all controversies relating thereto.

Point No. 13—The Court erred in ruling that its possession of the property of Boston and Providence Railroad Corporation withdraws that property from the jurisdiction of all other courts and disables other courts from exercising any power over it. 842

Point No. 14—The Court erred in failing to rule that exclusive jurisdiction to determine the claims contained in Petition for Order No. 301 and to grant the relief therein prayed for is vested in the District Court of the United States for the District of Massachusetts.

BOSTON AND PROVIDENCE RAILROAD CORPORATION 843
By /s/ DONALD C. STARR
Attorney
BENTLEY W. WARREN
CHARLES W. MULCAHY
Trustees of the property of Boston and Providence Railroad Corporation

Dated: February 16, 1939
30 State Street
Boston, Massachusetts

844

Designation of Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal.

[SAME TITLE]

To the Clerk of the District Court of the United States for the District of Connecticut:

Boston and Providence Railroad Corporation, and Bentley W. Warren and Charles W. Mulcahy, as Trustees
845 of the property of Boston and Providence Railroad Corporation, hereby designate the following portions of the record, proceedings, and evidence, excluding all formal portions thereof, to be contained in the record on appeal from the decision and order overruling jurisdictional objections to Petition for Order No. 301 herein:

	Pages in District Court Printed Record
1. Petition of The New York, New Haven and Hartford Railroad Company for
846 Reorganization Under Section 77 of the Bankruptcy Act as Amended (Petition for Order No. 1).	1-4
2. Order Approving Petition of The New York, New Haven and Hartford Railroad Company for Reorganization under Section 77 of the Bankruptcy Act as Amended (Order No. 1) excluding paragraphs 3(c)-3(h), 4, 5, 6, 7, 9 and 10 thereof.	5-13

	Pages in District Court Printed Record	
3. Order Appointing Trustees of The New York, New Haven and Hartford Railroad Company (Order No. 5), excluding paragraphs 8, 9 and 10 thereof.	85-88	
4. Report of Mailing of Notice of Disaffirmance of Lease Dated February 15, 1893, from Old Colony Railroad Company to The New York, New Haven and Hartford Railroad Company.	721-722	848
5. Petition of Old Colony Railroad Company for Reorganization under Section 77 of the Bankruptcy Act as Amended (Petition for Order No. 74), and lease dated February 15, 1893, from Old Colony Railroad Company to The New York, New Haven and Hartford Railroad Company annexed thereto marked Exhibit A, excluding from said lease the 4th, 5th, 7th, 10th, 14th, 16th, 17th, 18th and 19th paragraphs thereof as printed at pages 737-744 of the printed record of these proceedings.	731-746	849
6. Order Approving Petition of Old Colony Railroad Company for Reorganization under Section 77 of the Bankruptcy Act as Amended (Order No. 74), excluding paragraphs 3, 5 and 6 thereof.	747-750	

850 *Designation of Portions of the Record, etc.*

	Pages in District Court Printed Record
7. Order Appointing Trustees of Old Colony Railroad Company (Order No. 75).	817-826
8. Lease Dated April 7, 1888, from Boston and Providence Railroad Company to Old Colony Railroad Company, annexed to petition of Boston 851 and Providence Railroad Corporation for Leave to Intervene.	
9. Petition of Bankers Trust Company as Trustee, etc., for an Order Modifying Order No. 75 to Provide that the Trustees of the Property of the Principal Debtor shall Cease to Make Any Cash Payments under the Terms of the Lease of the Boston and Providence Railroad Corporation, Dated April 7, 1888 (Petition for Order No. 852 217), excluding therefrom paragraphs 2nd through 12th, inclusive.	3263-3279
10. Transcript of latter part of hearing held on December 22 and December 23, 1937, on Petition for Order No. 217.	3805-3815
11. Report on Administration of Property of Old Colony Railroad Company and of Providence, Warren and Bristol Railroad Company up to and including December 31, 1937, excluding paragraphs 1 through 11, inclusive, thereof.	4221-4228

	Pages in District Court Printed Record	
12. Statement of Objections of Boston and Providence Railroad Corporation to Report of Administration dated April 19, 1938, herein filed by the Trustees.	4325-4329	
13. Answer of Trustees of the Principal Debtor and of Old Colony Railroad Company to Petition for Order No. 217 and their Report and Recommendation Thereon.	4309-4314	854
14. Memorandum of Decision on Petition for Order No. 217 and the Trustees' Answer Thereto.	4497-4510	
15. Order on Petition of Bankers Trust Company as Trustee, for Order No. 217 (Order No. 217).	4597-4600	
16. Report of Mailing of Notice of Rejection of Lease Dated April 7, 1888, from Boston and Providence Railroad Corporation to Old Colony Railroad Company.	4601-4602	855
17. Petition of Trustees of the Principal Debtor and of Old Colony Railroad Company for a Charge Upon the Earnings and Property of Boston and Providence Railroad Corporation for Administration for the Period June 4, 1936 to December 31, 1937 (Petition for Order No. 301).		

		Pages in District Court Printed Record
	18. Petition of The Provident Institution for Savings in the Town of Boston for Reorganization of Boston and Providence Railroad Corporation under Section 77 of the Bankruptcy Act as Amended.	
857	19. Order of the District Court of the United States for the District of Massachusetts Approving Petition of The Provident Institution for Savings in the Town of Boston for Reorganization of Boston and Providence Railroad Corporation under Section 77 of the Bankruptcy Act as Amended, excluding paragraph 3 thereof and Exhibit A annexed thereto.	
858	20. Statement of Objections of Boston and Providence Railroad Corporation with Respect to Petition for Order No. 301.	5009-5011
	21. Memorandum of Decision on Jurisdictional Objections to Petition for Order No. 301.	5257-5272
	22. Petition of Trustees of Boston and Providence Railroad Corporation for Leave to Intervene Specially in the Proceedings for the Reorganization of The New York, New Haven and Hartford Railroad Company in the District Court of the United States for the District of Connecticut, dated February 13, 1939.	

	Pages in District Court Printed Record
23. Order Permitting Special Intervention of Trustees of Boston and Providence Railroad Corporation, entered on February 14, 1939.	
24. Petition for Appeal.	
25. Order Allowing Appeal.	860
26. Notice of Appeal.	
27. Statement by Appellants of Points on which they Intend to Rely on Appeal.	
28. Appellants' Designation of Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal.	861

Respectfully submitted,

BOSTON AND PROVIDENCE RAILROAD CORPORATION
/s/ DONALD C. STARR
Attorney

/s/ BENTLEY W. WARREN
/s/ CHARLES W. MULCAHY
Trustees of the property of Boston and Providence Railroad Corporation

Dated: February 16, 1939
30 State Street
Boston, Massachusetts

862

Designation of Additional Portions of the Record, Proceedings, and Evidence to be Included in the Record on Appeal from the Decision and Order Overruling Jurisdictional Objections to Petition for Order No. 301.

[SAME TITLE]

To the Clerk of the District Court of the United States for the District of Connecticut:

863 The undersigned Appellees hereby designate the following additional portions of the record, proceedings, and evidence, excluding all formal portions thereof, to be included in the record on appeal from the decision and order overruling jurisdictional objections to Petition for Order No. 301 herein:

	Pages in District Court, Printed Record
1. The portions of Order No. 1 not designated by Appellants,	7-12
864 2. Proof of mailing and of publication directed by Order No. 1,	55-59
3. The portions of Order No. 5 not designated by Appellants,	87-88
4. Petition for Order No. 17,	129-130
5. Order No. 17,	131-132
6. The portions of Exhibit A annexed to Petition for Order No. 74 not designated by Appellants,	738-744
7. The portions of Order No. 74 not designated by Appellants,	748-750

		Pages in District Court Printed Record
8.	Proof of mailing and of publication directed by Order No. 74,	785-786
9.	Order No. 149,	2251-2252
10.	Petition for Order No. 179,	2635-2641
11.	Order No. 179,	2643-2644
12.	The portions of Petition for Order No. 217 not designated by Appellants,	3264-3275
13.	The following portions of minutes of hearing held on December 6, 1937, on informal motion for postponement of hearing on Petition for Order No. 217: page 3733 of District Court printed record through page 3734, line 14; and page 3749, line 16, through page 3755, line 4.	
14.	The portions of Report of Administration of property of Old Colony Railroad Company and of Providence, Warren & Bristol Railroad Company up to and including December 31, 1937, not designated by Appellants, and Exhibits 1 and 2 thereto annexed,	4221-4227, 4229-4230
15.	Petition for Order No. 276,	4295-4299
16.	Order of Notice re Petition for Order No. 276,	4323
17.	Answer of Bankers Trust Company, as Trustee, to Petition for Order No. 276,	4387-4395

	Pages in District Court Printed Record
18. Answer of Protective Committee of the Shareholders of Old Colony Railroad Company to Petition for Order No. 276,	4397-4398
19. Pages 1 and 2 of minutes of hearing held on May 24 and May 25, 1938, and on June 2, 1938, on (a) the findings and recommendation of the Interstate Commerce Commission as to the method or formula for segregating and allocating earnings and expenses as between and to the divisions and parts of the railroad system under the administration of the Court in the proceedings, which are separately subject to the liens of the various mortgages or are or were separately subject to lease, (b) Report of Administration of property of Old Colony Railroad Company and of Providence, Warren & Bristol Railroad Company up to and including December 31, 1937, (c) Petition for Order No. 217, and (d) Petition for Order No. 276.	
20. Bankers Trust Company Exhibit 6 introduced at the hearing last mentioned (four letters, dated April 30, 1936, and May 4, May 7 and May 9, 1936, respectively).	
21. Order No. 283,	4399-4400
22. Order No. 284,	4405-4406

	Pages in District Court Printed Record	
23. Memorandum on Trustees' Report of Administration of property of Old Colony Railroad Company and of Providence, Warren & Bristol Railroad Company up to and including December 31, 1937,	4511-4528	
24. Petition for Order No. 296,	4529-4533	872
25. Pages 383 and 384 of minutes of hearing held on July 15, 1938, on Petition for Order No. 296.		
26. Order No. 300,	4593-4595	
27. Answer of Boston and Providence Railroad Corporation, Debtor, dated August 4, 1938, to petition of The Provident Institution for Savings in the Town of Boston, filed in the District Court of the United States for the District of Massachusetts.		873
28. Answer of Bankers Trust Company, as Trustee, to Petition for Order No. 301,	4663-4672	
29. The following portions of minutes of hearing held on August 9, 1938, on Petition for Order No. 301: pages 1 and 2 and from page 10, line 24, through page 12, line 3. (Add in brackets after last word of line 24 on page 10 the words "for the Boston and Providence").		

	Pages in District Court Printed Record
30. Order continuing date of hearing on Petition for Order No. 301,	4847
31. Order continuing date of hearing on Petition for Order No. 301,	4877
32. Order continuing date of hearing on Petition for Order No. 301,	4931
875 33. Order respecting filing of objections to allowance of Petition for Order No. 301,	4957-4958
34. Affidavit of mailing of copies of order respecting filing of objections to allowance of Petition for Order No. 301.	
35. Order continuing date of hearing on Petition for Order No. 301,	4987
36. The following portions of the minutes of hearing held on November 14, 1938, 876 on Petition for Order No. 301: page 1 through page 6, line 25; and page 14, line 7 through line 22 (omitting first sentence).	
37. Order providing for hearing on the merits of Petition for Order No. 301,	5401-5402

Respectfully submitted,

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, as the Trustees of the properties of Old Colony Railroad Company and of The New York, New Haven and Hartford Railroad Company,
by

HERMON J. WELLS,
their Attorney.

BANKERS TRUST COMPANY, Trustee under the First and Refunding Mortgage of The New York, New Haven and Hartford Railroad Company,
by
WHITE & CASE,
its Attorneys.

JAMES H. BREWSTER, JR., HARRY C. HAGERTY, GLADDEN W. BAKER, HAUGHTON BELL, FRED P. HAYWARD AND ALFRED H. MEYERS, as a Committee representing a "Group of Insurance Companies Acting to Protect Their Interests in the Securities of The New York, New Haven & Hartford Railroad Company System", 878
by
DAVIS, POLK, WARDWELL, GARDINER & REED,
their Attorneys.

BANK OF NEW YORK, Trustee under The New England Railroad Company Consolidated Mortgage,
by
ROOT, CLARK, BUCKNER & BALLANTINE,
Its Attorneys. 879

Dated: February 28, 1939.

880

Motion to Include Additional Matter in Record.

[SAME TITLE]

Now come Boston and Providence Railroad Corporation by its Attorney, and Bentley W. Warren and Charles W. Mulcahy, as Trustees of the property of Boston and Providence Railroad Corporation, and respectfully move that the petition of Bentley W. Warren and Charles W. Mulcahy, as Trustees of the property of Boston and
881 Providence Railroad Corporation, for Leave to Intervene Specially in the above proceedings, and the Order of this Court granting said petition, be incorporated in the record on appeal from the Memorandum of Decision upon Jurisdictional Objections to said Petition for Order No. 301.

BOSTON AND PROVIDENCE RAILROAD CORPORATION

By /s/ DONALD C. STARR
Attorney

882

/s/ BENTLEY W. WARREN
/s/ CHARLES W. MULCAHY
Trustees of the property of Boston and Providence Railroad Corporation

Dated: February , 1939
30 State Street
Boston, Massachusetts

883

Order Granting Motion.

[SAME TITLE]

Upon due consideration of the Motion of Boston and Providence Railroad Corporation and Bentley W. Warren and Charles W. Mulcahy, as Trustees of the property of Boston and Providence Railroad Corporation, to incorporate certain pleadings into the record upon Petition for Order No. 301 herein, and to include the same upon the record on appeal from the Memorandum of Decision on Jurisdictional Objections to said Petition for Order No. 301, it is hereby: 884

ORDERED, that the Petition of Bentley W. Warren and Charles W. Mulcahy, as Trustees of the property of Boston and Providence Railroad Corporation, for Leave to Intervene Specially in the above entitled proceedings, and the Order granting said petition entered herein on February 14, 1939, be and they hereby are incorporated in the record on appeal from the Memorandum of Decision on Jurisdictional Objections to said Petition for Order No. 301. 885

ENTER:

/s/ C. C. HINCKS,
United States District Judge.

Dated: February , 1939.

886

Acknowledgment of Service of Appeal Papers.

[SAME TITLE]

Due and timely service of the annexed copies of the Citation, Notice of Appeal, Petition of Boston and Providence Railroad Corporation, and Bentley W. Warren and Charles W. Mulcahy, Trustees of the property of Boston and Providence Railroad Corporation, for Appeal, Order Allowing such Appeal, Assignment of Errors, Des-
887 ignation of Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal, Statement by Appellants of Points on which they Intend to Rely on Appeal, Motion and Form of Order thereon, and Form of Assent to said Motion, is hereby acknowledged this 18th day of February, 1939.

/s/ Hermon J. Wells
Attorney for the Trustees of the Property of The New York, New Haven and Hartford Railroad Company and Old Colony Railroad Company

888 Dated this 18th day of February, 1939.

/s/ Stuart N. Scott
Attorney for Bank of New York, as Trustee under The New England Railroad Company Consolidated Mortgage

Dated this 19th day of February, 1939.

/s/ Oscar M. Shaw
Attorney for Old Colony Railroad Company

Dated this 18th day of February, 1939.

/s/ ROBERT G. DODGE
Attorney for Protective Committee of Shareholders of Old Colony Railroad Company

Dated this 20th day of February, 1939.

/s/ DAVIS, POLK, WARDWELL, GARDINER & REED
Attorneys for the "Insurance Group"

Dated this 20th day of February, 1939.

890

/s/ FITZHUGH MCGREW
Attorney for Bankers Trust Company, as Trustee under the First and Refunding Mortgage of The New York, New Haven and Hartford Railroad Company, dated December 9, 1920.

Dated this 2nd day of March, 1939.

/s/ BINGHAM, DANA & GOULD,
Attorneys for Old Colony Trust Company, Mortgage Trustee

891

Motion to Extend Time to File Record.

[SAME TITLE]

Now come Boston and Providence Railroad Corporation, and Bentley W. Warren and Charles W. Mulcahy, as Trustees of the property of Boston and Providence Railroad Corporation, by their attorneys, and respectfully represent that:

1. Pursuant to Notice of Appeal dated February 13, 1939, the Petitioners are prosecuting an appeal to the United States Circuit Court of Appeals for the Second Circuit from the decision and order of this Court overruling jurisdictional objections of Boston and Providence Railroad Corporation to Petition for Order No. 301 entered in these proceedings on January 16, 1939. The time limited by Rule 73 (g) of the Rules of Civil Procedure for the District Courts of the United States for docketing the action and filing the record on appeal is forty (40) days
893 from the date of the Notice of Appeal. The time within which said appeal may be docketed and the transcript of the record filed in said Circuit Court of Appeals under the above mentioned rule expires on March 25, 1939.

2. The preparation of the record on said appeal is in progress, but the completion and printing thereof will require additional time beyond March 25, 1939.

WHEREFORE, your Petitioners move that an Order be entered extending the time for docketing their said appeal and for filing the record on said appeal in said Circuit Court of Appeals, to and including the twenty-fourth
894 day of April, 1939.

/s/ DONALD C. STARR
Attorney for Boston and Providence Railroad Corporation

/s/ JOHN NOBLE, JR.
/s/ PAUL E. TROY
Attorneys for the Trustees of the Property of Boston and Providence Railroad Corporation

Dated: March 17, 1939
30 State Street
Boston, Massachusetts

895

Order Extending Time to File Record.

[SAME TITLE]

Upon due consideration of the Motion of Boston and Providence Railroad Corporation, and Bentley W. Warren and Charles W. Mulcahy, as Trustees of the property of Boston and Providence Railroad Corporation, for an Order extending the time for docketing their appeal from the Order of this Court entered January 16, 1939, overruling the jurisdictional objections of Boston and 896
Providence Railroad Corporation to Petition for Order No. 301 herein, and extending the time for filing the record on said appeal in the United States Circuit Court of Appeals for the Second Circuit, it is hereby

ORDERED, that the time within which said appeal may be docketed, and the record upon said appeal filed, in the United States Circuit Court of Appeals for the Second Circuit, be and the same hereby is extended and enlarged to and including April 24, 1939.

ENTER: 897

/s/ C. C. HINCKS,
United States District Judge.

Dated: March 17th 1939, at New Haven, Connecticut.

898

Order Extending Time to File Record.

[SAME TITLE]

Upon due consideration of the Motion of Bentley W. Warren and Charles W. Mulcahy, as Trustees of the property of Boston and Providence Railroad Corporation for an order extending the time for docketing their appeal from the Order of this Court entered January 16, 1939, overruling jurisdictional objections to Petition for
899 Order No. 301 herein and extending the time for filing the record on said appeal in the United States Circuit Court of Appeals for the Second Circuit, it is hereby

Ordered, that the time within which said appeal may be docketed, and the record upon said appeal filed, in the United States Circuit Court of Appeals for the Second Circuit, be and the same hereby is extended and enlarged to and including May 4th, 1939.

Enter:

900 C. C. Hincks,
United States District Judge.

Dated: April 20, 1939.

901

Order.

[SAME TITLE]

Upon consideration of the motion of Bentley W. Warren and Charles W. Mulcahy as Trustees of the property of Boston and Providence Railroad Corporation for an order extending the time for docketing their appeal from the order of this Court entered January 16, 1939, overruling jurisdictional objections to Petition for Order No. 301 herein and extending the time for filing the record on said appeal in the United States Circuit Court of Appeals for the Second Circuit, it is hereby ORDERED:

902

That the time within which said appeal may be docketed and the record upon said appeal filed in the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is extended and enlarged to and including May 13, 1939.

ENTER:

C. C. HINCKS,
United States District Judge.

903

Dated: May 1, 1939.

The undersigned hereby consents to the entry of the foregoing order.

H. J. WELLS.

Dated: April 29, 1939.

Stipulation as to Record.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true and correct transcript of the record in the District Court of the United States for the District of Connecticut (in the Reorganization Proceedings of The New York, New Haven and Hartford Railroad Company) in the appeal from decision and order overruling jurisdictional objections to petition for order No. 301 of said District Court prosecuted pursuant to the order allowing appeal entered by said District Court on February 14, 1939, and Notice of Appeal filed with said Court on February 14, 1939, as agreed upon by the undersigned.

Dated: , 1939.

JOHN NOBLE, JR.,
Of counsel for the Trustees of Boston and Providence Railroad Corporation, Appellants.

DONALD C. STARR,
Counsel for Boston and Providence Railroad Corporation, Appellant.

HERMON J. WELL,
Attorney for the Trustees of the property of The New York, New Haven and Hartford Railroad Company and of Old Colony Railroad Company, Appellees.

WHITE & CASE,
Attorneys for Bankers Trust Company, Trustee under the First and Refunding Mortgage of The New York, New Haven and Hartford Railroad Company, Appellee.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Insurance Company Group Committee, Appellee.

ROOT, CLARK, BUCKNER & BALLANTINE,
Attorneys for Bank of New York, as Trustee under the New England Railroad Company Consolidated Mortgage, Appellee.

907

Clerk's Certificate.

United States of America, }
District of Connecticut, } ss.:

I, CHARLES E. PICKETT, Clerk of the District Court of the United States for the District of Connecticut, Do HEREBY CERTIFY that the foregoing is a true and correct transcript of the record of the said District Court in the matter of Decision and Order upon Jurisdictional Objections to Petition for Order No. 301 in the reorganization proceedings of The New York, New Haven and Hartford Railroad Company and in the matter of the appeals from said Order.

908

IN TESTIMONY WHEREOF, I have caused the seal of said Court to be hereunto affixed at the City of New Haven, in the District of Connecticut, this 10th day of May, in the year of our Lord One Thousand Nine Hundred and Thirty Nine and of the Independence of the United States the One Hundred and Sixty-third.

C. E. PICKETT,
Clerk.

909

by HELEN HOODLEY,
Deputy Clerk.

(Seal)

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Nos. 38-98—October Term, 1939.

(Argued November 17, 1939 Decided December 18, 1939.)

HOWARD S. PALMER, *et al.*, Trustees of the New York, New Haven and Hartford Railroad Company,

Appellees,

v.

BENTLEY W. WARREN, *et al.*, Trustees of the Boston & Providence Railroad Corporation,

Appellants.

Appeals by the Boston & Providence Railroad Corporation, and its trustees in reörganization, from two orders in bankruptcy of the District Court for the District of Connecticut, entered in a proceeding under §77 of the Bankruptcy Act to reörganize the New York, New Haven and Hartford Railroad Company and the Old Colony Railroad Company.

Before:

L. HAND, AUGUSTUS N. HAND and CLARK,

Circuit Judges.

ERWIN N. GRISWOLD for the appellants.

HERMON J. WELLS and J. H. GARDINER, JR. for the appellees.

L. HAND, *C. J.*:

The Boston & Providence R. R. Corporation and its trustees in reörganization appeal from two orders, en-

tered in a joint proceeding under §77 of the Bankruptcy Act to reörganize the New York, New Haven and Hartford R. R. Co. and the Old Colony R. R. Co. The first of these orders, entered January 16, 1939, decided that the bankruptcy court had jurisdiction to determine the amount of the deficit caused by the operation of the Boston & Providence between the day when the New Haven rejected its lease of the property of the Old Colony (June 3, 1936) and December 31, 1937; and further to determine and declare whether this deficit was a lien upon the road. The second order, entered April 20, 1939, liquidated 914
the amount of the deficit, and charged it as a lien prior to general creditors—there was no mortgage. The Boston & Providence is a Massachusetts corporation and the owner of a railroad, running, as its name implies, between Boston and Providence; in 1888 it leased all its property for 99 years to the Old Colony, also a Massachusetts corporation, owning and operating a network of lines in that state. In 1893 the Old Colony in turn leased its own lines —including the term for years that it held of the Boston & Providence—to the New Haven; also for a term of 99 years. The New Haven operated all three roads until, having become insolvent, it was put into reörganization 915
under §77 of the Bankruptcy Act, on October 23, 1935, and Palmer and others were made its trustees. The trustees continued to operate the Old Colony as lessees until June 3, 1936, when, by order of the bankruptcy court they rejected the lease, and they thereafter operated it by virtue of an order, presumably made under subdivision (c) (6) of §77, although the order did not so recite. All three roads had run at a deficit for the first seven months, and on June 3, 1936, the Old Colony was also put into reörganization under §77. Since the New Haven held a majority of its shares, the court united the two proceedings, as the statute allows (subd. a); and appointed the same trustees. The deficits still continued, and on July

19, 1938, the Court instructed the trustees to reject the Boston & Providence lease, which they did; though they continued, as before, to operate both roads at the court's order under subd. (c) (6) of §77. On August 4th, 1938, the Boston & Providence was put into reörganization, and Warren and others were appointed its trustees. That proceeding was in the District Court of Massachusetts, and could not have been united with the joint one at bar, because neither the New Haven, nor the Old Colony, owned a majority of the Boston & Providence shares, as
917 required by subd. (a) of §77. The appeals (over both of which we have jurisdiction, *Robertson* v. *Berger*, 102 Fed. (2) 530 (C. C. A. 2) involve the following questions: (1) whether the Connecticut court had jurisdiction to declare that the Boston & Providence operating deficit between June 4, 1936, and December 31, 1937, was a lien upon the Boston & Providence reversion; (2) if so, whether that court was right in declaring that the deficit did constitute a lien; (3) whether the amount found was correct.

1) The Jurisdiction of the Connecticut Court.

The Supreme Court has laid it down in numerous deci-
918 sions that a court, state or federal, which has once lawfully assumed custody of property, may adjudicate any claims against it, not only when the claimant intervenes in the suit and asks that his rights be declared, but when the court cites him in *in invitum*.* Courts of other juris-

Ex parte Christy, 3 Howard 292; *Whitney* v. *Wenman*, 198 U. S. 539; *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38; *Murphy* v. *John Hofman Co.*, 211 U. S. 562; *Hebert* v. *Crawford*, 228 U. S. 204; *Chicago Board of Trade* v. *Johnson*, 264 U. S. 1, 11; *Taubel, etc., Co.* v. *Fox*, 264 U. S. 426, 433-33; *Isaacs* v. *Hobbs Tie & T. Co.*, 282 U. S. 734; *Straton* v. *New*, 283 U. S. 318, 321; *Ex parte Baldwin*, 291 U. S. 610, 615-17; *Harris* v. *Brundage Co.*, 305 U. S. 160, 163.

dictions will recognize its judgment as res judicata, and it may enjoin claimants from prosecuting their rights elsewhere, except as it finds it more convenient to allow them to do so. All this is entirely familiar law, and the Boston & Providence does not dispute it; it says that it is inapplicable, because the district court never came into possession of its property. The argument is that the Old Colony got only a term for 99 years; and that the district court could take possession of no more than the lessee had had. This misconceives the nature of the doctrine, which depends merely upon possession in the natural sense that the court's officers are in control of the property de facto and can exclude all others. Indeed it would be scarcely practicable to adopt any other basis for jurisdiction. Were it necessary that the court should have possession of the insolvent's legal interest in order to adjudicate it, it would follow that every erroneous judgment would be beyond its proper jurisdiction, and it would have the right to act only when it acted correctly. Moreover, we can attach no meaning whatever to the "possession" of a legal interest in a thing, except as it means possession of the thing as an object of nature. The reason lying back of the whole doctrine is practical rather than conceptual, as appears very plainly when the dispute concerns the right to possession. A court which has custody of the res, must at some time surrender it, and it can know to whom it should deliver only in case it either decides the right to possession itself, or awaits the action of such other competent tribunal as the claimant may choose. The second course subjects it to an indefinite delay in the dispatch of the cause before it, and may effectively cripple its powers. The same is not indeed true where the claimant demands, not the right to possession, but a lien or other similar interest in the res; the custodial court might then content itself with learning who was entitled to possession, and leave any other in-

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terests unadjudicated; indeed that is what it does in cases like a bare possessory libel in the admiralty, for instance. But this would leave incomplete the purpose of the main suit, if, as is generally the case, that is the distribution of the assets in its hands, which presupposes that all liens have been ascertained. In the case at bar the New Haven is not, it is true, resisting a lien; it is itself the claimant, a putative lienor. But, although, so far as we have found, that situation has not come before the courts, it seems to us plainly a variant of a claim to the right
923 to possession. If the roads were private corporations, there could be no doubt about this. The Boston & Providence would in that case be asserting the right to possession, which the New Haven and Old Colony would be resisting on the ground that they had a lien on the road; it would be a typical case in which the court would have jurisdiction. Because the Boston & Providence is a public servant, and cannot, for the present at least, be operated as a separate carrier, this result is disguised; it and the Old Colony must be operated under the control and possession of the New Haven; subd. (c) (6) of § 77. But we can see no reason why this should falsify the relations
924 between the two roads themselves; indeed, if it has any effect upon them, it is to confirm our conclusion, for the New Haven's possession is not likely to be disturbed. It may possibly be true that the Connecticut court will have to resort through its trustees to the Massachusetts court to realize upon the lien. If so, it is because distribution of the Boston & Providence assets—more properly the new allocation of interests in them—has been confided to the Massachusetts court. But that need not affect the power of the Connecticut court to liquidate and fix the rank of the lien. Nor would a consistent application of this reasoning require us to extend the jurisdiction of the Connecticut court to the collection of unsecured claims of the New Haven against third persons. The presence of

the debtor within reach of the court's process is not a condition upon the exercise of power to declare legal interests in property which is *in gremio legis*. The fact that the Connecticut court could go no further and hold the Boston & Providence generally liable, is no reason why it may not declare what interests the New Haven and Old Colony have in its road.

Finally, the Boston & Providence argues that since §77 (a) gave "exclusive jurisdiction" to the Massachusetts court over "the debtor and its property wherever located", that court alone may adjudicate the lien. That, 926
however, is a sword with two edges for the Connecticut court had an equally "exclusive jurisdiction" over the "property wherever located" of the New Haven and of the Old Colony. The lien is as much their "property" as the encumbered fee is the Boston & Providence's, and the res to which the lien attaches is the same as that in which the fee resides. Granting arguendo that each court has "exclusive jurisdiction" over the legal interests of its debtor in the res, so far as those interests do not conflict, each cannot have it when they do, and there is no reason a priori to prefer one court over the other. In that logical dilemma we can only resort to the doctrine 927
normally applicable in such cases; i.e., that the court first taking over the res, draws to itself power to determine all claims upon it.

Nor is this conclusion affected by the fact that Congress deliberately refused to provide for the joint reorganization of lessors and lessees, unless one held a majority of the others' shares. Mere liquidation of the lien is in no sense a joint reorganization of the three roads. It is quite true that if one corporation in reorganization has a claim upon the assets of another in reorganization, the court of the first has no power to liquidate that claim as part of the reorganization; the first corporation must be content to present its claim and take what the plan of the second

gives it in exchange, merely as one of its own assets to be dealt with in its own reörganization, like any other; a dividend in bankruptcy, for example. Nevertheless the mere fact that the court of the first corporation liquidates the claim because it has possession of the second's property, does not make the two reörganizations one. That would not even be true, though the court followed liquidation by assuming to declare what interest in the second corporation the first should receive in exchange for the lien. To do so would indeed *pro tanto* impinge upon
929 the plan of the second (except in the rare case where the lien was not "adversely and materially affected by the plan" subd. (e) §77); but it would still be untrue to say that there would be only a single reörganization. And if the power of the first court must end with liquidation, and if the first corporation can receive in exchange for its adjudicated lien only that interest which the plan of the second gives it, plainly it would be absurd to say that there was a single reörganization. We cannot agree therefore that the order of January 16, 1939, assumed a power which §77 forbade. No doubt the Connecticut court might, had it chosen, have left it to the Massachusetts court to
930 liquidate the claim; any court having custody of a res may always do that. But there was the plainest justification for not doing so here. Precisely the same questions arose between the New Haven and the Old Colony and had to be dealt with in this proceeding; not only would it have involved a duplication of labor to refuse jurisdiction but it might have resulted in contradictory rulings upon the same issue. The order is affirmed.

On the Merits.

The second order on appeal, Order No. 301, liquidated the deficit until December 31, 1937; it went no further because the New Haven's "Report of Administration" stopped at the end of that year. The controversy arises

over the judge's ruling that by its participation in certain earlier proceedings, especially those terminating in Order No. 300, the Boston & Providence was estopped to contest the New Haven's and Old Colony's demand. This involves some statement of the proceedings in the Connecticut suit. On June 18, 1936, shortly after the Old Colony went into reörganization, the judge passed Order No. 75, paragraph nine of which declared that in case the Old Colony should reject any contract or lease—the Boston & Providence lease was not named—"the operation of the leased property shall have been * * * for the 932
account of the lessor and such payment shall be * * * charged on the earnings and properties of the land, prior to any mortgage or other lien". The court had already made a similar order on November 30, 1935, respecting the New Haven—Order No. 17—and its trustees had undertaken certain "segregation studies" which seemed to show that the Boston & Providence was being operated at a loss. On October 7, 1937, the Bankers Trust Company, a mortgagee of the New Haven, filed a petition ("Petition for Order No. 217") requesting the court to stop the rentals upon the Boston & Providence lease. The Boston & Providence, which on May 27, 1937, had already ap- 933
peared generally in the suit, opposed this, and the judge refused the relief at that time, but directed the New Haven trustees to prepare a complete account up to the end of the year 1937 for his information. This they did, adopting a "Segregation Formula", by which to apportion the deficit equitably between the Old Colony, the Boston & Providence, and a third road, the Providence, Warren & Bristol, over the period from October 24, 1935, to December 31, 1937. They submitted this report to the Interstate Commerce Commission for its approval, and the Boston & Providence appeared before the Commission also, seeking a more favorable distribution of the burden. The Commission reported back to the court on April 15,

1938, that the account was "as fair and equitable as the circumstances permit", and on the 19th the New Haven and Old Colony trustees filed their "Report of Administration", including their accounting and the Commission's action. While this was not in form a petition, it concluded with a prayer that the court should approve the annexed accounts, and should declare the deficit to be "a charge on the earnings and or properties of said subsidiary debtors prior to any mortgage or other lien thereon as expenses of administration". The Boston & Providence
935 filed objections to this report on April 30, 1938; the day before it had filed a petition ("Petition for Order No. 276") for an order modifying paragraph 9 of Order 75 so as to provide that in case of the rejection of any lease by the Old Colony, the court should reserve "for future determination all questions arising out of any such * * * rejection concerning rights and liabilities * * * for operation of the leased properties and for payments made". The court did not dispose of this petition, but held hearings on the trustees' "Report of Administration" in May and June, at which the New Haven made its proof. The Boston & Providence took part in these hearings, exam-
936 ined witnesses, and offered some evidence. Thereupon, on July 18, 1938, the court entered "Order No. 300", approving the "Report of Administration", and fixing the joint operating deficit of the Old Colony, the Boston & Providence, and the Providence, Warren & Bristol Railroad, from October 23, 1935, to December 31, 1937, at $11,789,000. This it allocated as follows: $5,775,000 against the Old Colony, $5,461,000 against the Boston & Providence, and $552,000 against the Providence, Warren & Bristol. The deficits against the Old Colony and the Boston & Providence were declared to be a charge upon the "earnings and property of the Old Colony Railroad Company as an expense of administration prior to any mortgage or other lien thereon". On the next day the

court decided the "Petition for Order No. 217" of the Bankers Trust Company by directing the Old Colony trustees to reject the lease, to cease making any payments under it, and to operate the road under subdivision (c) (6) §77. This order concluded as follows: "The Court reserves for further hearing the right to determine the existence and amount of any obligation of the Boston & Providence arising out of operation of its property or payments made to it or on its behalf prior to the rejection of its lease, and the liability of the Boston & Providence therefor to the Old Colony estate and by way of subroga- 938
tion to the New Haven estate. And pending such determination the Court will withhold its final ruling on "Petition for Order No. 276". The New Haven and Old Colony on July 29th filed a petition for the approval of their accounts against the Boston & Providence, showing a deficit of $3,955,000, which they prayed should be charged as a prior lien on its property ("Petition for Order No. 301"). The amount claimed differed from the deficit awarded against the Boston & Providence by Order No. 300, because the period of the accounting began only with the repudiation of the Old Colony lease, June 4, 1936.

Thus there remained open on August 1, 1938, only the 939
petition of the Boston & Providence for Order No. 276, and the petition of the New Haven and Old Colony trustees for Order No. 301. The Boston & Providence, having meanwhile gone into reorganization, first filed objections to the jurisdiction of the court over "Petition for Order No. 301"; which the judge overruled on January 16, 1939. That is the order which we have already affirmed. He then held hearings on the merits; but because he thought that all questions had been finally settled by Order No. 300, he refused to receive any evidence as to the correctness of the "Segregation Formula"; or to permit a fresh liquidation of the Boston & Providence's share of the deficit. He liquidated the claim at the amount prayed in the peti-

tion and declared that it was secured by a prior lien upon the property of the Boston & Providence, in reduction of the lien imposed upon the Old Colony by Order No. 300. On May 5th he entered another order denying "Petition for Order No. 276". The second appeal is from Order No. 301, entered April 20, 1939.

The New Haven and Old Colony seek to support the judge's ruling upon the same grounds which he gave himself; that is, that the Boston & Providence had appeared generally in the proceeding, had objected to the Bankers
941 Trust Co's "Petition for Order No. 217", and to the trustees' "Report of Administration" which followed upon it. They say that, having been heard at length, the road was not free to relitigate any of the questions decided, among which was the proper apportionment of the deficit and the validity of the lien. Had it not been for the concluding paragraph of Order No. 217, conceivably this reasoning might prevail; but we cannot see how it can survive what was there declared. When originally submitted to the judge, paragraph five of the order provided that all operating expenses since June 3rd, 1936, should be deemed made on behalf of the Boston & Provi-
942 dence and should be prior liens. However, the Bankers Trust Co., which presented the order, agreed to add as a suffix the language we quoted above. The Boston & Providence protested that this would determine its liability and leave nothing to decide but the accounting, if it even left that; and the judge observed that the suffix nullified the main provisions, and suggested that the earlier part be omitted. It was then objected that Order No. 75 in substance provided the same thing. To this the judge replied: "I say these items shall be charged by such method as the court shall determine. And now, at Mr. Warren's request, I am going to say they shall be determined at a further hearing". In view of this we cannot see what else the order meant than that "the existence and amount of

the obligation" was to be left at large, and not deemed concluded by Order No. 300. Indeed, the judge indicated several times at the hearings upon the "Report of Administration" that he understood that the Boston & Providence must have a separate hearing upon its liability. And in his opinion, although he quoted the language of paragraph five of Order No. 217, he did not discuss its effect, being apparently concerned only with that of Order No. 300, taken alone. What was so left open, i.e., "existence and amount of the obligation", covered the whole dispute. Certainly the "amount of the obligation" in- 944
cluded the apportionment of the deficit and opened the "Segregation Formula" to attack. If it be argued that it did not open the existence and rank of any lien securing the "obligation" and that Order No. 300 might be an estoppel as to that, the last sentence lays any doubts, for it declared that the court would defer action upon "Petition for Order 276", and that asked a modification of Order 75 so that the deficit, among other payments, should not become a lien upon the property of the Boston & Providence. What then was left for the estoppel of Order No. 300? If it was proposed to treat that order as an estoppel as to any of these matters, paragraph five was, 945
to say the least, extremely misleading. Whether the Boston & Providence would have appealed from Order No. 300, if not so assured, we cannot indeed know; but surely it was entitled to assume that it need not do so. On this record it appears not to have had its day in court, and the order must be reversed so that it shall.

Order of January 16, 1939, affirmed.
Order No. 301 reversed.

Order for Mandate.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court-house in the City of New York, on the 8th day of January, one thousand nine hundred and forty.

Present:

HON. LEARNED HAND,
HON. AUGUSTUS N. HAND,
HON. CHARLES E. CLARK,

Circuit Judges.

No. 38.

In the Matter

of

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

Debtor,

BENTLEY W. WARREN and CHARLES W. MULCAHY, as Trustees, etc.,

Appellants.

Appeal from the District Court of the United States for the District of Connecticut.

949

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of the said District Court of January 16, 1939, be and it hereby is affirmed, without costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

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D. E. ROBERTS,
Clerk.

(Endorsed—United States Circuit Court of Appeals, Second Circuit—In re New York, New Haven & Hartford Railroad Co. (No. 38)—Order for Mandate.)

951

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Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 317, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

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In the Matter

of

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

Debtor,

BENTLEY W. WARREN and CHARLES W. MULCAHY, as Trustees, etc.,

Appellants,

as the same remain of record and on file in my office.

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IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighth day of (SEAL) January, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. ROBERTS,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied *the petition shall be treated as though filed in response to* such writ.

FILE COPY

Office - Supreme Court, U. S.
JAN 13 1940
CHARLES ELMORE CROPLEY
CLERK

No. 643

Supreme Court of the United States.

OCTOBER TERM, 1939.

IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

BENTLEY W. WARREN AND CHARLES W. MULCAHY, AS THE TRUSTEES OF THE PROPERTY OF BOSTON AND PROVIDENCE RAILROAD CORPORATION,

v.

HOWARD S. PALMER ET ALS., AS THE TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND OLD COLONY RAILROAD COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

ERWIN N. GRISWOLD,
JOHN NOBLE, JR.,
PAUL E. TROY,
Attorneys for the Petitioners.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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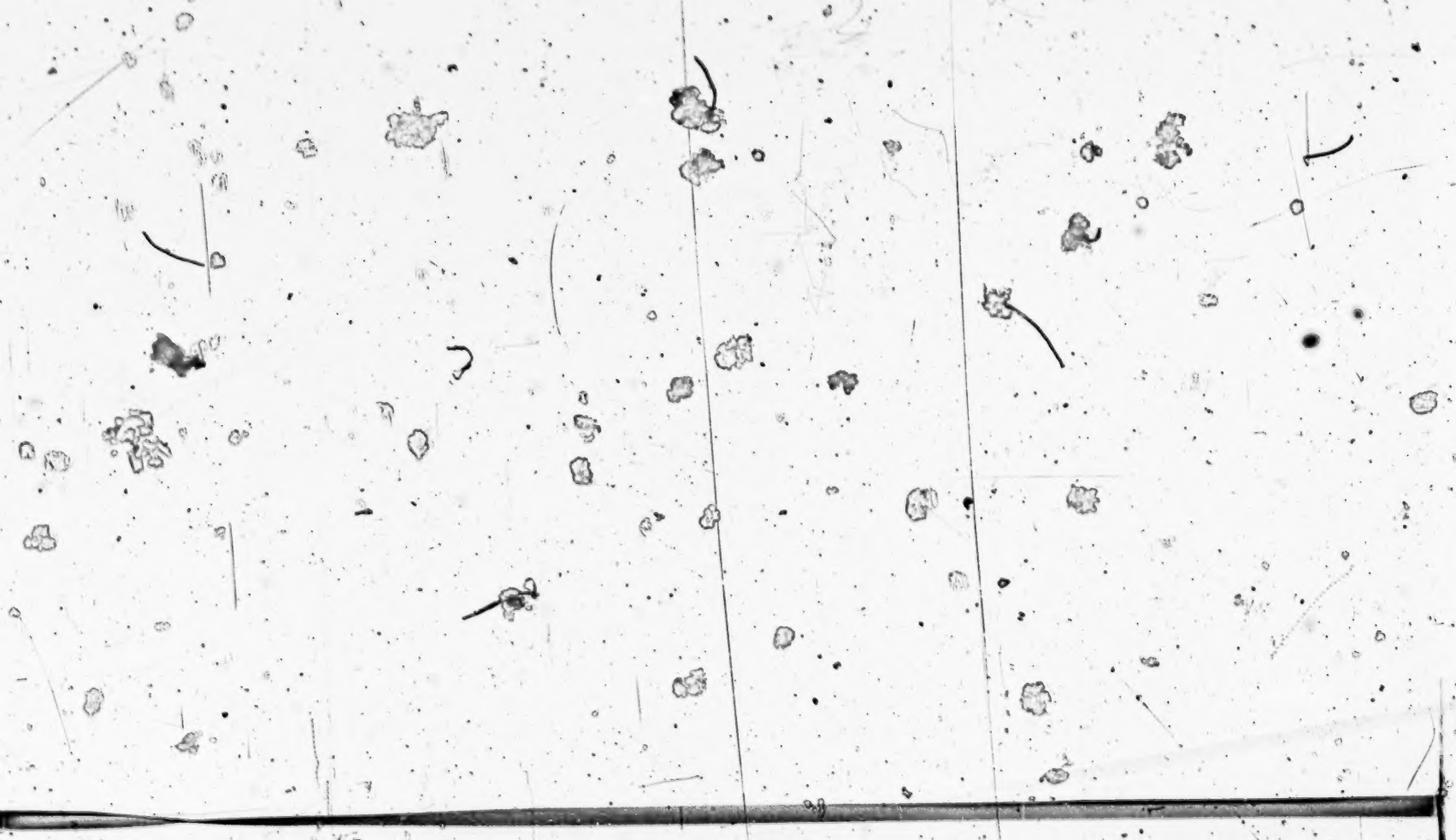

Supreme Court of the United States.

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IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

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v.

HOWARD S. PALMER ET ALS., AS THE TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND OLD COLONY RAILROAD COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The undersigned, on behalf of Bentley W. Warren and Charles W. Mulcahy, trustees of the property of the Boston and Providence Railroad Corporation, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on January 8, 1940, holding that the

United States District Court for the District of Connecticut had jurisdiction of the proceeding in question.

Opinions Below.

The opinion and order of the District Court for the District of Connecticut (R. 251-267) is reported in 26 F. Supp. 18. The opinion of the Circuit Court of Appeals (R. 304-315) is not yet reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on January 8, 1940 (R. 316-317). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether the District Court for the District of Connecticut, before which proceedings for the reorganization of The New York, New Haven and Hartford Railroad Company and Old Colony Railroad Company are pending under Section 77 of the Bankruptcy Act, has jurisdiction of a proceeding to determine the existence and amount of a claim against, and impose a lien upon the property of, the Boston and Providence Railroad Corporation, which is being reorganized under Section 77 of the Bankruptcy Act in the District Court for the District of Massachusetts.

Statutes Involved.

The statute involved is Section 77 of the Bankruptcy Act, applicable portions of which are set forth in the Appendix.

STATEMENT.

The Boston and Providence Railroad Corporation is the owner of a line of railroad between Boston, Massachusetts, and Providence, Rhode Island, which was leased to the Old Colony Railroad Company for ninety-nine years from April 1, 1888 (R. 69-90). In 1893 the Old Colony leased its property to The New York, New Haven and Hartford Railroad Company for a term of ninety-nine years, including its leasehold interest in the Boston and Providence (R. 36-44). On October 23, 1935, the New Haven filed a petition for reorganization under Section 77 of the Bankruptcy Act in the District Court for the District of Connecticut (R. 6-8), and trustees were appointed on November 8, 1935 (R. 22-24). On June 1, 1936, the trustees gave notice rejecting the lease of the Old Colony to the New Haven (R. 29).

On June 3, 1936, the Old Colony filed a petition for reorganization under Section 77 of the Bankruptcy Act as a subsidiary debtor in the District Court for the District of Connecticut (R. 30-44), and on June 18, 1936, despite the obvious diversity of interests, the court appointed the same persons as trustees for the Old Colony as it had appointed for the New Haven (R. 51-59). This order directed the trustees of the New Haven to continue to possess and operate the properties of Old Colony, the operation to be for the account of the Old Colony or the trustees of its property. Thereafter, on May 26, 1937, the Boston and Providence Railroad Corporation filed a petition asking leave to intervene generally in the proceedings for the reorganization of the New Haven and the Old Colony (R. 62-90). On May 27, 1937, the court entered an order permitting the Boston and Providence to intervene (R. 90-91).

On October 7, 1937, the Bankers Trust Company, as trustee under the first and refunding mortgage of the New Haven, filed its petition for Order No. 217 to require the

trustees of the New Haven to cease to make any cash payments for the account of the Old Colony or its trustees under the lease of the Boston and Providence Railroad Corporation (R. 92-104). Thereafter, on July 19, 1938, the court entered Order No. 217 directing the trustees of the Old Colony to disaffirm and reject the lease of the Boston and Providence, and restraining the trustees of the Old Colony and the New Haven from making any further payments under the lease to the Boston and Providence (R. 208-210). This order provided that "the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision (c)(6) of Section 77 of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf of and for the account of the Old Colony estate but without expense to the New Haven estate."

The Old Colony and the New Haven did not at any time "elect no longer to operate the leased line;" nor did the Boston and Providence at any time file any petition with the court asking for the operation of its road as provided in Section 77 (c)(6).

The lease was thereupon rejected by notice dated July 19, 1938 (R. 211). Following the rejection of the lease of the Boston and Providence, the trustees of the New Haven and of the Old Colony filed a petition for Order No. 301, seeking approval of their account showing a deficit in the operation of the Boston and Providence Railroad from June 4, 1936, to December 31, 1937, in the amount of $3,955,298.93, and an order that this sum with interest should "constitute a lien and charge on the earnings and property of Boston and Providence Railroad Corporation in the pos-

session of this Court prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said Company . . ." (R. 212-220).

On August 4, 1938, a petition was filed by a creditor of the Boston and Providence Railroad Corporation in the District Court for the District of Massachusetts seeking the reorganization of the Boston and Providence under Section 77 of the Bankruptcy Act (R. 221-226). This petition was approved on August 5, 1938 (R. 227-228), and the petitioners were appointed trustees of the property of the Boston and Providence and qualified as such on October 18, 1938, upon the confirmation of their appointment on October 8, 1938, by the Interstate Commerce Commission.

On October 31, 1938, the Boston and Providence Railroad Corporation filed a statement with the court in Connecticut setting forth the facts of the Massachusetts proceedings and the appointment of trustees for the Boston and Providence, and contending that under Section 77 of the Bankruptcy Act the Massachusetts court had "exclusive jurisdiction of the debtor and its property wherever located"—that consequently the District Court in Connecticut had no jurisdiction over the property of the Boston and Providence, or its trustees, and thus was without jurisdiction to enter the requested Order No. 301 (R. 244-246). No appearance was entered on behalf of the trustees of the Boston and Providence.

On January 16, 1939, the court entered its memorandum and order overruling the jurisdictional objections of the Boston and Providence (R. 251-267). On February 14, 1939, the petitioners, as trustees of the property of the Boston and Providence Railroad Corporation, pursuant to authority granted by the District Court for the District of Massachusetts, filed a petition for leave to intervene specially for the limited purpose of joining in and prosecuting an appeal from the order of the court overruling the jurisdic-

tional objections to the petition for Order No. 301, and of defending against the claims contained in that petition (R. 268-269). An order to this effect was entered on the same day (R. 270), and the appeal was also allowed the same day (R. 273).

The Circuit Court of Appeals affirmed this decision holding that the District Court in Connecticut had jurisdiction to entertain the petition for Order No. 301, to adjudicate the claims involved, and to create a lien upon the property of the Boston and Providence. This is the decision which is sought to be reviewed here.[1]

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In affirming the order of the District Court.

2. In holding that the District Court for the District of Connecticut had jurisdiction to determine the existence and amount of any claim against, and impose a lien upon the property of, Boston and Providence Railroad Corporation of its trustees.

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[1] Following the jurisdictional decision, the District Court proceeded to a hearing on the merits. It determined a deficit in the amount of $3,955,298.93 against the Boston and Providence for the period through December 31, 1937, and declared that the "said amount be and it hereby constitutes a lien, charge or claim on the earnings and property of Boston and Providence Railroad Corporation, prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said corporation." An appeal from this decision on the merits was heard by the Circuit Court of Appeals below at the same time as the appeal from the jurisdictional decision. The Circuit Court of Appeals reversed the decision on the merits and sent the case back for further proceedings in the District Court (R. 315). The petitioners raise no question in the present proceeding as to the decision of the court below on the merits, except so far as the question of jurisdiction was saved in the appeal upon the merits.

3. In holding that the trustees of the New Haven and of the Old Colony had physical possession of the property of the Boston and Providence Railroad Corporation.

4. In holding that physical possession of the property of the Boston and Providence by the trustees of the New Haven and Old Colony appointed by the Connecticut court gave to that court jurisdiction to determine claims affecting the title to that property.

5. In holding that the lien which the New Haven and Old Colony trustees sought to have imposed upon the property of the Boston and Providence was a sufficient property interest, before its adjudication, to give jurisdiction to the Connecticut court to adjudicate it and impose it upon the Boston and Providence estate.

6. In holding that the "exclusive jurisdiction" over the Boston and Providence "and its property wherever located," given to the Massachusetts court by Section 77 of the Bankruptcy Act, would permit the existence of jurisdiction over the Boston and Providence or its property in the Connecticut court.

Reasons for Granting the Writ.

1. The decision below is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Magnolia Petroleum Co.* v. *Thompson,* 106 F. (2d) 217, in which this Court has granted a writ of certiorari, December 4, 1939, No. 481, October Term, 1939.

In the *Magnolia Petroleum* case, the trustee of the property of a railroad in reorganization under Section 77 of the Bankruptcy Act, applied to the court for instructions as to his right to drill for oil under the surface of the land occupied by the railroad. The trustee claimed to own the fee of the land, while adverse claimants contended that the railroad had only a right of way, leaving the underlying fee

in the railroad's grantors. The "first question presented" on the appeal was "the jurisdiction of the district court as a court of bankruptcy to determine in a summary proceeding the adverse claims to the fee title to the land" (106 F. (2d) at 222). The trustee contended that the court had jurisdiction because he was in actual possession of the land.

The court considered the conveyances upon which the trustee relied, and held that they granted only an easement. From this it held (106 F. (2d) at 228): ". . . it follows that the possession of the trustee and his grantors under the deed did not extend to the oil and gas underlying the land." The court then stated its conclusion as to the jurisdiction of the District Court (106 F. (2d) at 228):

> "We hold that the petition on its face showed that the petitioner was not in possession, actual or constructive, of the mineral, oil and gas rights underlying the railroad right of way over and across the three tracts of land in the deeds relied upon; that, consequently, the court was without jurisdiction to make the order appealed from; and that the order was wholly void."

In the *Magnolia Petroleum* case the division of property interests was physical. Here it may be said to be chronological. This does not affect the analogy, however, as far as possession is concerned. Here the trustees of the New Haven and of the Old Colony had only a leasehold interest in the property of the Boston and Providence, and they lost even this when they rejected the lease. The underlying fee remained in the Boston and Providence just as title to the subsoil remained in the grantors in the *Magnolia Petroleum case*. Thus the decision below, that the fee interest of the Boston and Providence is subject to the jurisdiction of the Connecticut District Court, is in conflict with the decision in the *Magnolia Petroleum* case.

Moreover, the conflict is one of substance. The effect of the decision in the *Magnolia Petroleum* case is that persons who have granted an interest in property may not be compelled to come into their grantee's bankruptcy proceedings and submit their remaining interest in the property to the jurisdiction of the bankruptcy court. The decision below is that a corporation which has granted a leasehold in its property *can* be compelled to submit its rights in the fee to the jurisdiction of the lessee's bankruptcy court.

It is doubtless true that this Court granted the writ in the *Magnolia Petroleum* case because of the conflict which developed on the issue whether the deeds in question granted the fee or only an easement. This does not negative the conflict which now exists with the decision below on the jurisdictional question. Indeed, it emphasizes it. The conflict as to the nature of the interest granted by the deeds is immaterial except on the assumption that the court below in the *Magnolia Petroleum* case did not have jurisdiction if the railroad did not have the fee. In the present case there can be no pretense that the New Haven or Old Colony owned the fee of the Boston and Providence.

The conflict is emphasized when the language of the opinion below is examined. The court below says (R. 307) that the argument that the fee of the Boston and Providence was not subject to the jurisdiction of the Connecticut court "misconceived the nature of the doctrine, which depends merely upon possession in the natural sense that the court's officers are in control of the property de facto and can exclude all others." Yet in the *Magnolia Petroleum* case it was held that "possession" of the trustee and the railroad under the easement "did not extend to the oil and gas underlying the land" (106 F. (2d) at 228)[2]—though it was clear

[2] Earlier in its opinion (106 F. (2d) at 222) the court recited the agreement of counsel that, if the deeds granted only an easement, the railroad did not have possession of the underlying oil

that "the court's officers [were] in control of the property de facto and [could] exclude all others." The court below held (R. 307):

> "Were it necessary that the Court should have possession of the insolvent's legal interest in order to adjudicate it, it would follow that every erroneous judgment would be beyond its proper jurisdiction."

Yet that is just what the court in the *Magnolia* case held. Its decision was not merely that the court below there had acted erroneously in construing the deeds to grant a fee, but that "the court was without jurisdiction" to make the order appealed from; and that the order was wholly void (106 F. (2d) at 228).

The court below seems to recognize its own lack of jurisdiction when it says (R. 308): "It may possibly be true that the Connecticut court will have to resort through its trustees to the Massachusetts court to realize upon the lien." Why should the Connecticut court have jurisdiction to impose a lien which it cannot enforce? Why should the Massachusetts court, which can enforce the lien, and upon which falls the obligation to reorganize the Boston and Providence, have its hands tied through the creation of an overwhelming lien by another court where the Boston and Providence is not and cannot be in reorganization? How can the Connecticut court have jurisdiction to impose a lien "prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said company," when the other claims against the Boston and Provi-

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and gas, "from which it would follow that the court was without jurisdiction." Quite apart from the fact that counsel cannot stipulate the law, it is clear from the opinion in the *Magnolia* case that the court actually considered and decided this question as a matter of law, and that the decision is not a mere reflection of an unwarranted concession by counsel.

dence estate are not, and cannot be, before the Connecticut court?

The court below seems to be engaging in a clear case of judicial boot-strap lifting when it says (R. 309): "The lien [claimed by the New Haven and the Old Colony] is as much their 'property' as the encumbered fee is the Boston and Providence's . . ." Yet, is it not clear that the Connecticut court cannot create a lien unless that court has jurisdiction? How can it be said that that court has jurisdiction because the lien is the property of the New Haven and the Old Colony when the very question of the existence of the lien depends upon the jurisdiction of the Connecticut court? To assert that the court has jurisdiction to create a lien because the lien so created is property within its jurisdiction is seemingly to engage in a question-begging circle.

2. The decision below is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *General Motors Acceptance Corp.* v. *Horton*, 85 F. (2d) 452. In that case the vendor of an automobile sought to regain possession of it from his vendee's trustee in bankruptcy. The court directed its return, holding that the transaction in question was a lease. It said (85 F. (2d) at 453):

> "If the transaction was a conditional sale, title to the automobile was in the vendee and passed to its trustee in bankruptcy as of the date of the filing of the petition; but if the contract was a lease, title did not pass and the property belongs to the appellant."

Thus, despite the fact that the vendee was in possession of the property, the court held that possession was not determinative, but title; and that when the transaction was a lease, the lessor's interest was not subject to adjudication in the bankruptcy court.

In the present case the transaction was unquestionably a lease; yet the court below held (R. 307) that jurisdiction "depends merely upon possession in the natural sense that the court's officers are in control of the property de facto and can exclude all others."[3]

The decision below is also in conflict with that court's own decision in *In re Lake's Laundry, Inc.*, 79 F. (2d) 326 (1935), certiorari denied, 296 U.S. 622 (1935), in which Judge Learned Hand, the author of the opinion below, filed a dissenting opinion. In the *Lake's Laundry* case the court below held that property sold to a debtor under conditional sales contracts was not subject to the jurisdiction of the court in which the debtor was being reorganized under Section 77B of the Bankruptcy Act (identical in wording with the provision of Section 77 involved here). It would seem that the present case of a lessor's interest should *a fortiori* lead to the same conclusion.

3. The decision below does violence to the plain language of the statute which has given "exclusive jurisdiction of the debtor and its property wherever located" to the Massachusetts District Court in which the Boston and Providence is being reorganized. It cannot be denied that the decision below flies in the teeth of this clear and specific language. Such a result should not be justified by "construction."

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[3] That jurisdiction under Section 77 depends upon ownership and not possession has been recognized by this Court in *Ex parte Baldwin*, 291 U.S. 610, 615 (1933), where the Court said: "All property in the possession of a bankrupt *of which he claims ownership* passes, upon the filing of a petition in bankruptcy, to the custody of the court of bankruptcy." (Italics ours.) See also Gilbert's Collier on Bankruptcy (1937), 1467: "Sec. 77 thus shifts from the former bankruptcy notions of possession to that of title in determining the court's jurisdiction over the debtor's property and its consequential power to control it."

The court below, as has been pointed out, sought to get around this statutory direction by the process of assuming that the lien in question was the property of the New Haven and Old Colony. The question-begging nature of this process has already been suggested.

The mere fact that it might be convenient or desirable, from the New Haven point of view, to have all matters determined in the Connecticut court does not furnish a basis for overriding the clear and specific direction of Congress. Congress has made no provision for the reorganization of non-subsidiary lessors in the same proceedings with their lessees. That it might have been advantageous to the lessees if Congress had done so is beside the point. Congress has specifically provided that the Boston and Providence shall be reorganized in Massachusetts and only in Massachusetts. It has provided in terms that the Massachusetts court shall have "exclusive jurisdiction over the debtor and its property wherever located." It cannot have contemplated that some other court should have the power to adjudicate an overwhelming lien against the Boston and Providence, which the Massachusetts court might only mechanically or perfunctorily enforce. That is not "exclusive jurisdiction over the debtor and its property wherever located." That is mere ancillary action. But the Massachusetts court is not a mere ancillary court in the reorganization of the Boston and Providence. It is not merely the primary court in that reorganization—it is the *only* court which Congress has vested with jurisdiction in that proceeding.

Congress has not seen fit to provide for a single court for the reorganization of the New Haven system, including its lessors. Yet the effect of the decision below is to do just that despite the plain provision of the statute to the contrary. That result cannot be justified on the ground

of convenience. Convenience to the New Haven, it may be—but that is not ground for deciding all questions in the Connecticut court. See *Palmer* v. *Massachusetts*, decided November 6, 1939, No. 7, October Term, 1939. And the reorganization of the Boston and Providence should not be governed from the point of view of the New Haven. It is the Massachusetts court to which Congress has given "exclusive jurisdiction" of the Boston and Providence "and its property wherever located." That clear mandate of the statute discloses the intention of Congress as to the forum in which claims against the Boston and Providence and its property should be liquidated. The courts should not override the statute either by assuming that some of the Boston and Providence's property is before the Connecticut court or by assuming a one-sided "convenience" which Congress did not make material when it legislated.

4. The opinion below decides an important question of federal law which has not been, but should be, settled by this Court. As this Court pointed out in *Palmer* v. *Massachusetts*, No. 7, October Term, 1939: "About a fourth of the railroad mileage of the country is now in bankruptcy." It is well known that a large part of this mileage is operated under lease, and that lessors will almost invariably have to be reorganized when their lessees default on the leases. The question of jurisdiction in the reorganization of these lessors is obviously a question of practical and public importance. Under the decision below, though the Massachusetts court alone has power to reorganize the Boston and Providence, it is in fact left no real control over that reorganization. That decision divides the desired exclusive jurisdiction into a dual jurisdiction. Indeed, it converts the Massachusetts court into a subordinate tribunal to the

Connecticut court. It elevates the latter into the position of creator of liabilities of the Debtor and emasculates the power of the former, which should be fundamental in any bankruptcy court, to determine the existence and amount and priority of liabilities of the Debtor, declared by the statute, although denied by the decision below, to be subject to the exclusive jurisdiction of the Massachusetts court. The well-recognized power of reorganization trustees to raise funds through trustee's certificates, for example, is plainly nullified if there is power existing in some other court to impose a lien on the former lessor's property "prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness." Yet the court below concedes this obstructive, indeed destructive, jurisdiction to the Connecticut court. The inescapable consequence of such a division of jurisdiction would be to destroy the primary court's power to reorganize its debtor.

One of the plain purposes in the enactment of Section 77 of the Bankruptcy Act was to establish a single court which should have "exclusive jurisdiction" to reorganize a railroad corporation. The effect of the decision below is to bring back in substance much of the confusion and difficulty which attended the old system of primary and ancillary receiverships. The decision below, depriving the Massachusetts court of its exclusive jurisdiction to reorganize the Boston and Providence in any practical sense, thus negatives the apparent and salutary purpose of Section 77 and presents a highly important question of federal law which should be finally determined by this Court.

Conclusion.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
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Attorneys for the Petitioners.

January, 1940.

APPENDIX.

Excerpts from Section 77 of the Bankruptcy Act as Amended.

Section 77-(a). Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"): *Provided,* That when any railroad, although engaged in interstate commerce, lies wholly within one State, such proceedings shall be brought in the Federal district court of the district in which its principal operating office in such State during the preceding six months or the greater portion thereof has been located. The petition shall be accompanied by payment to the clerk of a filing fee of $100, which shall be in addition to the fees required to be collected by the clerk under other sections of this Act. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose.

. . . . . .

Section 77-(c) (6). If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended.

. . . . . .

Section 77-(c) (10). The judge may direct the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

. . . . . .

Section 77-(j) . . . The title of any owner, whether as trustee or otherwise, to rolling-stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this section.

No. 643.

Supreme Court of the United States.

OCTOBER TERM, 1939.

IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

BENTLEY W. WARREN AND CHARLES W. MULCAHY, AS THE TRUSTEES OF THE PROPERTY OF BOSTON AND PROVIDENCE RAILROAD CORPORATION,

v.

HOWARD S. PALMER ET ALS., AS THE TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND OLD COLONY RAILROAD COMPANY.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

In addition to the authorities cited in the petition, counsel for the petitioners desire to direct the attention of the Court to the decision of the Circuit Court of Appeals for the Eighth Circuit in *Thompson* v. *Terminal Shares, Inc.*, 104 F. (2d) 1, 9, in which case this Court denied petitions

for writs of certiorari, October 9, 1939, Nos. 218, 219, October Term, 1939.

The *Terminal Shares* case, like the present case, involved the jurisdiction of a bankruptcy court under Section 77 of the Bankruptcy Act. The trustee of a railroad in bankruptcy in the District Court for the Eastern District of Missouri started a proceeding in that court to recover a sum of money which had been paid under a contract, and to establish and foreclose an equitable lien on certain securities. None of the defendants was present or served with process in the Eastern District of Missouri, and the securities upon which the lien was claimed were likewise outside of the District. Upon motion of the defendants, the District Court held that it was without jurisdiction. This decision was affirmed by the Circuit Court of Appeals.

The *Terminal Shares* case and the present case thus involve the same fundamental question of the jurisdiction of a court of bankruptcy under Section 77 to adjudicate rights between the bankrupt estate and persons outside of the judicial district in property located outside of the district, and to impose a lien upon such property in favor of the bankrupt estate.

There are, it is true, factual distinctions between the two cases. These distinctions, however, do not affect the essential similarity of the jurisdictional questions involved. Thus in the *Terminal Shares* case it may be pointed out that the bankruptcy trustees had neither title to nor possession of any interest in the property upon which they sought to have the lien imposed. If the trustee ever had title in that case, it terminated upon the repudiation of the contract, just as in the present case the leasehold interest terminated upon rejection of the Boston and Providence lease. In the present case, moreover, it is not disputed that title to and the reversionary interest in the Boston and Providence property has at all times been either in that corporation or in

the petitioners as trustees. This title and reversionary interest is the property interest which is sought to be subjected to a lien, and is no more in the possession of the Connecticut court than was the property in the *Terminal Shares* case in the possession of that bankruptcy court.

Similarly, it appears that the claim which was the subject of the *Terminal Shares* case existed at the time of the bankruptcy and was therefore clearly a part of the estate over which the bankruptcy court got jurisdiction under Section 77(a). In this case, the claim arose after the New Haven bankruptcy. To the extent that this difference is material, it should operate against the jurisdiction of the Connecticut court over the claim and lien in the present case. Here the claim was never property of the Debtor and thus not within Section 77(a).

It is clear that the opinion below and the opinion of the *Terminal Shares* case exhibit many points of inconsistency both in argument and approach. For example, the court below has supported the jurisdiction of the Connecticut court by saying that the lien claimed by the New Haven and Old Colony Trustees upon the property of the Boston and Providence is property of the New Haven and Old Colony and thus within the "exclusive jurisdiction" of the Connecticut court under Section 77(a), despite the fact that the very existence of the lien is disputed. In the *Terminal Shares* case there was likewise a claim of lien and an argument that this claim was property of the debtor and thus within the jurisdiction of the District Court of Eastern Missouri. But this contention was rejected. There is here a considerable element of conflict.

Turning to another point, the court in the *Terminal Shares* case said (104 F. (2d) at 9): "To sustain the lower court's jurisdiction of this suit would do violence to the general policy of Congress that persons shall not be subjected to civil suits except in the districts of which they are inhabi-

tants." The court below, on the other hand, has taken an opposite view of the jurisdiction of the Connecticut court, giving to it a disproportionately broad effect while giving no practical effect to the "exclusive jurisdiction" over the property of the Boston and Providence granted to the Massachusetts court.

The existence of such divergent opinions and conflicting results in the lower courts as the *Terminal Shares* opinion and the opinion below, together with the opinion in *Magnolia Petroleum Company* v. *Thompson*, referred to in the petition, can lead only to uncertainty and confusion in the administration of Section 77 of the Bankruptcy Act, and will result in a lack of uniformity among the Circuits. The extent of this confusion is rather heightened than diminished by the factual differences between the cases. It can be eliminated only by a decision of this Court.

For this further reason, therefore, it is respectfully submitted that the petition should be granted.

ERWIN N. GRISWOLD,
JOHN NOBLE, JR.,
PAUL E. TROY,
Attorneys for the Petitioners.

January, 1940.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 643.

BENTLEY W. WARREN and CHARLES W. MULCAHY, as the Trustees of the Property of BOSTON AND PROVIDENCE RAILROAD CORPORATION,

v.

HOWARD S. PALMER, ET AL., as the Trustees of the Property of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND OLD COLONY RAILROAD COMPANY.

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

MEMORANDUM FOR THE PETITIONERS.

ERWIN N. GRISWOLD,
JOHN NOBLE, JR.,
PAUL E. TROY,
Attorneys for the Petitioners.

February 29, 1940.

Supreme Court of the United States

OCTOBER TERM, 1939.

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BENTLEY W. WARREN and CHARLES W. MULCAHY, as the Trustees of the Property of BOSTON AND PROVIDENCE RAILROAD CORPORATION,

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HOWARD S. PALMER, ET AL., as the Trustees of the Property of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND OLD COLONY RAILROAD COMPANY.

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

MEMORANDUM FOR THE PETITIONERS.

The argument of the case of *Thompson* v. *Magnolia Petroleum Co.*, No. 481, October Term, 1939, on Wednesday, February 28, 1940, seems to have disclosed clearly the essential conflict between the decision below in that case on the question of jurisdiction, and the decision of the court below here. The decision of the Seventh Circuit

Court of Appeals was clearly a decision on *jurisdiction*, and as such cannot fairly be reconciled with the decision below in this case.

But in the *Magnolia Petroleum* case, the question of jurisdiction and the question on the merits happen to coincide. For that reason, counsel on neither side of that case was concerned with arguing the underlying question of jurisdiction. The case was presented for the petitioner on the assumption that it would do no good for this Court to reverse the decision on jurisdiction, if the decision below must necessarily go against the petitioner on the merits; while the respondent has no interest in the jurisdictional question as long as the deeds are held to grant only an easement. Neither party presented any argument on the question of the jurisdiction of the District Court, except in response to the questions of the Court. Moreover, such discussion as there was proceeded in terms of possession, while further argument and consideration might show that possession is not the test of jurisdiction under Section 77 of the Bankruptcy Act. See Assignment of Error No. 4 in the petition in this case.

For this reason, we submit that the present petitioners should not be foreclosed by any decision which might be directed towards the jurisdictional question in the *Magnolia Petroleum* case. The existing conflict should not be resolved without full consideration. The relevant arguments can be adequately presented to the Court only by granting the writ of certiorari in this case, with the resulting briefs of both parties and oral argument on the basic question of jurisdiction—a question which goes by default of both parties in the *Magnolia Petroleum* case.

This is especially true because of the added factors against jurisdiction in this case which are not present in the *Magnolia Petroleum* case, such as the fact that Congress has expressly granted to the Massachusetts court "exclusive jurisdiction" of the Boston and Providence and its property. The petitioners here should not be foreclosed

on such questions by a decision in the *Magnolia Petroleum* case where neither counsel was concerned with directing argument towards the jurisdictional question.

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted so that the jurisdictional question may be adequately presented by both sides, and the conflict resolved after full consideration by the Court.

Respectfully submitted,

ERWIN N. GRISWOLD,
JOHN NOBLE, JR.,
PAUL E. TROY,
Attorneys for the Petitioners.

February 29, 1940.

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No. 643

Supreme Court of the United States

OCTOBER TERM, 1939

IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

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v.

HOWARD S. PALMER ET ALS., AS THE TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND OLD COLONY RAILROAD COMPANY

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 643

IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

BENTLEY W. WARREN AND CHARLES W. MULCAHY, AS THE TRUSTEES OF THE PROPERTY OF BOSTON AND PROVIDENCE RAILROAD CORPORATION

v.

HOWARD S. PALMER ET ALS., AS THE TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND OLD COLONY RAILROAD COMPANY

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion and order of the District Court for the District of Connecticut (R. 251-267) are reported in 26 F. Supp.

18. The opinion of the Circuit Court of Appeals (R. 304-315) is reported in 108 F. (2d) 164.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 8, 1940 (R. 316-317). The petition for a writ of certiorari was filed on January 13, 1940, and was granted on March 4, 1940. The jurisdiction of this Court rests on § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

The Boston and Providence Railroad Corporation leased its line to the Old Colony Railroad Company, and the Old Colony later leased all of its property to The New York, New Haven and Hartford Railroad Company. The New Haven and the Old Colony are in reorganization before the District Court for the District of Connecticut under § 77 of the Bankruptcy Act, and the trustees of the New Haven have continued the operation of the property of the Boston and Providence.

The question is whether the District Court in Connecticut has jurisdiction of a proceeding to determine the existence and amount of a claim against, and to impose a lien upon the property of, the Boston and Providence, which is itself being reorganized under § 77 of the Bankruptcy Act in the District Court for the District of Massachusetts.

Statutes Involved

The statute involved is § 77 of the Bankruptcy Act, applicable portions of which are set forth in the footnotes at the points where they become relevant, and in the Appendix.

Statement

The Boston and Providence Railroad Corporation is the owner of a line of railroad between Boston, Massachusetts, and Providence, Rhode Island, which was leased to the Old Colony Railroad Company for ninety-nine years from April 1, 1888 (R. 69-90). In 1893 the Old Colony leased its property to The New York, New Haven and Hartford Railroad Company for a term of ninety-nine years, including its leasehold interest in the Boston and Providence (R. 36-44). On October 23, 1935, the New Haven filed a petition for reorganization under § 77 of the Bankruptcy Act in the District Court for the District of Connecticut (R. 6-8), and trustees were appointed on November 8, 1935 (R. 22-24). On June 1, 1936, the trustees gave notice rejecting the lease of the Old Colony to the New Haven (R. 29).

On June 3, 1936, the Old Colony filed a petition for reorganization under § 77 of the Bankruptcy Act as a subsidiary debtor in the District Court for the District of Connecticut (R. 30-44), and on June 18, 1936, despite the obvious diversity of interests, the court appointed the same persons as trustees for the Old Colony as it had appointed for the New Haven (R. 51-59). This order directed the trustees of the New Haven to continue to possess and operate the properties of Old Colony, the operation to be for the account of the Old Colony or the trustees of its property. Thereafter, on May 26, 1937, the Boston and Providence Railroad Corporation filed a petition asking leave to intervene generally in the proceedings for the reorganization of the New Haven and the Old Colony (R. 62-90). On May 27, 1937, the court entered an order permitting the Boston and Providence to intervene "for the purpose of protecting its rights and the rights of its shareholders and of other persons interested in its property and assets" (R. 90-91).

On October 7, 1937, the Bankers Trust Company, as trustee under the first and refunding mortgage of the New

Haven, filed its petition for Order No. 217 to require the trustees of the New Haven to cease to make any cash payments for the account of the Old Colony or its trustees under the lease of the Boston and Providence Railroad Corporation (R. 92-104). Thereafter, on July 19, 1938, the court entered Order No. 217 directing the trustees of the Old Colony to disaffirm and reject the lease of the Boston and Providence, and restraining the trustees of the Old Colony and the New Haven from making any further payments under the lease to the Boston and Providence (R. 208-210). This order provided that "the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision (c)(6) of § 77 of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf of and for the account of the Old Colony estate but without expense to the New Haven estate."

Neither the Old Colony nor the New Haven nor the trustees of either of them at any time elected "no longer to operate the leased line [Boston and Providence]," nor has the Connecticut court ever fixed a period within which the Boston and Providence shall begin the operation of its line, or, upon petition of the Boston and Providence, decreed that it would be impracticable and contrary to the public interest for the Boston and Providence to operate its line, all as provided in § 77(c)(6).

The lease was thereupon rejected by notice dated July 19, 1938 (R. 211). Following the rejection of the lease of the Boston and Providence, the trustees of the New Haven and of the Old Colony filed a petition for Order No. 301, seeking approval of their account showing a deficit in the operation of the Boston and Providence Railroad from June

4, 1936, to December 31, 1937, in the amount of $3,955,298.93, and an order that this sum with interest should "constitute a lien and charge on the earnings and property of Boston and Providence Railroad Corporation in the possession of this Court prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said Company . . ." (R. 212-220).

On August 4, 1938, a petition was filed by a creditor of the Boston and Providence Railroad Corporation in the District Court for the District of Massachusetts seeking the reorganization of the Boston and Providence under § 77 of the Bankruptcy Act (R. 221-226). This petition was approved on August 5, 1938 (R. 227-228), and the petitioners were appointed trustees of the property of the Boston and Providence, were confirmed by the Interstate Commerce Commission on October 8, 1938, and qualified as such on October 18, 1938.

On October 31, 1938, the Boston and Providence Railroad Corporation filed a statement with the court in Connecticut setting forth the facts of the Massachusetts proceedings and the appointment of trustees for the Boston and Providence, and contending that under § 77 of the Bankruptcy Act the Massachusetts court had "exclusive jurisdiction of the debtor and its property wherever located"—that consequently the District Court in Connecticut had no jurisdiction over the property of the Boston and Providence, or its trustees, and thus was without jurisdiction to enter the requested Order No. 301 (R. 244-246). No appearance was entered on behalf of the trustees of the Boston and Providence.

On January 16, 1939, the court entered its memorandum and order overruling the jurisdictional objections of the Boston and Providence (R. 251-267). On February 14, 1939, the petitioners, as trustees of the property of the Boston and Providence Railroad Corporation, pursuant to author-

ity granted by the District Court for the District of Massachusetts, filed a petition for leave to intervene specially for the limited purpose of joining in and prosecuting an appeal from the order of the court overruling the jurisdictional objections to the petition for Order No. 301, and of defending against the claims contained in that petition (R. 268-269). An order to this effect was entered on the same day (R. 270), and the appeal was also allowed the same day (R. 273).

The Circuit Court of Appeals affirmed this decision holding that the District Court in Connecticut had jurisdiction to entertain the petition for Order No. 301, to adjudicate the claims involved, and to create a lien upon the property of the Boston and Providence. This is the decision which is to be reviewed here.[1]

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In affirming the order of the District Court.

2. In holding that the District Court for the District of Connecticut had jurisdiction to determine the existence and

[1] Following the jurisdictional decision, the District Court proceeded to a hearing on the merits. It determined a deficit in the amount of $3,953,298.93 against the Boston and Providence for the period through December 31, 1937, and declared that the "said amount be and if hereby constitutes a lien, charge or claim on the earnings and property of Boston and Providence Railroad Corporation, prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said corporation." An appeal from this decision on the merits was heard by the Circuit Court of Appeals below at the same time as the appeal from the jurisdictional decision. The Circuit Court of Appeals reversed the decision on the merits and sent the case back for further proceedings in the District Court (R. 315). The petitioners raise no question in the present proceeding as to the decision of the court below on the merits, except so far as the question of jurisdiction was saved in the appeal upon the merits.

amount of any claim against, and impose a lien upon the property of, Boston and Providence Railroad Corporation or its trustees.

3. In holding that the trustees of the New Haven and of the Old Colony had physical possession of the property of the Boston and Providence Railroad Corporation.

4. In holding that physical possession of the property of the Boston and Providence by the trustees of the New Haven and Old Colony appointed by the Connecticut court gave to that court jurisdiction to determine claims affecting the title to that property.

5. In holding that the lien which the New Haven and Old Colony trustees sought to have imposed upon the property of the Boston and Providence was a sufficient property interest, before its adjudication, to give jurisdiction to the Connecticut court to adjudicate it and impose it upon the Boston and Providence estate.

6. In holding that the "exclusive jurisdiction" over the Boston and Providence "and its property wherever located," given to the Massachusetts court by § 77 of the Bankruptcy Act, would permit the existence of jurisdiction over the Boston and Providence or its property in the Connecticut court.

Summary of Argument

I

The difficulty in this case arises from a confusion of different senses of the word "jurisdiction." There is, *first*, jurisdiction to determine what property within the custody of the court is property of the bankrupt and subject to the administration of the bankruptcy court. And, *second*, there is jurisdiction to conduct the administration of the bankrupt's property. Jurisdiction of the second sort, we contend,

is lacking with respect to the property here involved; for the property of the Boston and Providence was not subject to administration within the Connecticut court's bankruptcy jurisdiction. Even though that court may have had possession of the property, within the proper construction of that term, and even though § 77 still turns upon possession in part, the jurisdiction resulting from possession is not broad enough to sustain the relief sought in this case.

II

A. Property which does not belong to the debtor is not subject to administration in the debtor's bankruptcy. This rule is fully applicable to the lessor's interest in property which was in the possession of the bankrupt under the lease. It is also confirmed by cases involving other situations where property is in the possession of the debtor but not owned by him.

B. This rule is applicable in proceedings under § 77. Under § 77(a) the Connecticut court acquired "exclusive jurisdiction" over its debtors' property; but this did not give it jurisdiction over the Boston and Providence and *its* property. There is nothing in § 77 which extends the jurisdiction of the bankruptcy court to administer property in the possession of the debtor which it did not own. The Boston and Providence could not be reorganized by the Connecticut court.

Section 77 did not impose any duty on the New Haven which would serve as the foundation for implying that the Connecticut court would have a correlative jurisdiction to determine the consequences of the performance of that duty. The duty to operate the railroad existed independently of § 77. That section gave the New Haven a means of escaping the existing burden, but on terms which the New Haven has not seen fit to follow. There is nothing in § 77(c)(6) which suggests that the adjudication of the ac-

count in this case is the exclusive prerogative of the Connecticut court.

C. The jurisdiction of the Connecticut court is not aided by its status as a receivership court. A receivership court does not have jurisdiction over property beyond its territorial limits. The Massachusetts court here is not a mere ancillary court in the New Haven reorganization. It is instead the primary court in the reorganization of the Boston and Providence.

The claim which Petition for Order No. 301 seeks to assert is one which has grown up wholly in equity proceedings. The respondents must take it subject to the territorial limitations on the Connecticut court's jurisdiction to act as an equity receivership court. To say that the lien in question is property within the jurisdiction of the Connecticut court is seemingly to beg the question. It *proves* the preliminary but necessary element of jurisdiction by *assuming* the very point to be proved on the merits.

D. The claim of jurisdiction to determine the priority of the lien is obviously excessive and demonstrates the invalidity of the whole claim of jurisdiction.

III

Exclusive jurisdiction over the Boston and Providence and its property is now vested in the District Court in Massachusetts. This would seem to follow from the plain language of § 77(a) of the Bankruptcy Act which gives the Massachusetts court "exclusive jurisdiction of the debtor and its property wherever located." The sweep of these words is emphasized by their brevity. Congress did not provide for the unified reorganization of railroad *systems*. The only place where the lessor in this case may be reorganized is in the District Court for Massachusetts, and Congress has undertaken to make that reorganization effective by giving the Massachusetts court "exclusive jurisdiction."

Under the decision below, although the Massachusetts court alone has power under the statute to reorganize the Boston and Providence, it is in fact left no real control over that reorganization. If the New Haven claim can properly be liquidated by the Connecticut court, and the rank of the lien fixed by the Connecticut court, then the Massachusetts court has only a perfunctory jurisdiction over "the new allocation of interests in" the Boston and Providence property. It must dispose of all its debtor's property on the say-so of another court.

That the plain words of § 77(a) should be given their plain meaning is shown by other provisions of the statute.

The jurisdiction of the Connecticut court cannot be sustained on the ground that it first took over the *res*. There are many cases in which it has been held that a bankruptcy court supersedes a jurisdiction which has already been obtained by another court. Here the Massachusetts court is exercising bankruptcy jurisdiction so far as the property of the Boston and Providence is concerned. The Massachusetts court is the bankruptcy court and has paramount jurisdiction. Only by recognizing the paramount jurisdiction of the Massachusetts court can the purpose of Congress to achieve a unified disposition of the debtor's estate be obtained.

Argument

I

The Problem of Jurisdiction

The question in this case is whether the District Court for the District of Connecticut has "jurisdiction" in a summary bankruptcy proceeding to determine the existence and amount of a claim against the Boston and Providence and to impose the amount so determined as "a lien and charge on

the earnings and property of the Boston and Providence Railroad Corporation . . . prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said company . . .". This is the prayer of the petition in this case (R. 216-217). These were the terms of the order which the District Court actually entered in this case and which, on the merits, was reversed by the court below. We contend that the order sought by Petition for Order No. 301 is not one which the District Court has power to enter either in the exercise of its summary bankruptcy jurisdiction or otherwise.

The chief difficulty in this case arises, we believe, from a confusion between different senses of the chameleon word "jurisdiction." There does not seem to be any particular reason to doubt that the Connecticut court had some sort of "jurisdiction" over the physical property owned by the Boston and Providence. Certainly, it had jurisdiction over the leasehold interest of the Old Colony and the New Haven in the Boston and Providence property. Its officers were in fact operating the Boston and Providence property, and the lease was not rejected during the entire period in question. If, however, the lease had terminated during this period, it would not seem that the Boston and Providence could simply have re-entered its property and put out the officers of the Connecticut court. That would not have been orderly procedure. That would apparently have been contempt of the Connecticut court. The proper way to have proceeded would have been by filing a reclamation petition with the Connecticut court. The Connecticut court undoubtedly would have had "jurisdiction" to consider and to grant such a petition in proper circumstances.

That is all that is meant by the cases which hold that a bankruptcy court acquires "jurisdiction" over property in the *possession* of the bankrupt. If the bankrupt is in possession of property in which he has no interest, the true

owner cannot simply seize it. That would lead to obvious conflicts and confusion. He must make orderly application to the bankruptcy court to have his property restored to him; and on such application, if it appears that it is his property, it is the duty of the court to direct that it be turned over to him. Jurisdiction to enter such an order does not mean, however, that the bankruptcy court has "jurisdiction" over the property for all purposes, and particularly it does not mean that the bankruptcy court has "jurisdiction" to administer the property in a summary bankruptcy proceeding.

Two very different sorts of jurisdiction are being talked about. There is, *first*, jurisdiction to determine what property within the custody of the court is property of the bankrupt and subject to the administration of the bankruptcy court, and to conserve such property and the court's jurisdiction over it pending such determination. This is essentially nothing more than an application of the rule that a court has jurisdiction to determine its own jurisdiction. See *Matter of National Labor Relations Board*, 304 U.S. 486, 494 (1938). And, *second*, there is jurisdiction to conduct the administration of the bankrupt's property. Jurisdiction of the first sort may exist in the Connecticut court in this case. Jurisdiction of the second sort, we contend, is lacking with respect to the property here involved; for the property of the Boston and Providence was not the property of the debtors in that court and was not subject to administration within that court's bankruptcy jurisdiction. Process of the district court has never issued to support non-bankruptcy jurisdiction under § 24 of the Judicial Code or otherwise, and indeed no claim of such jurisdiction has been made.

The distinction between the extent of the bankruptcy court's jurisdiction in these two situations cannot be derived with logical certainty from any premises of territoriality or otherwise. It is not the product of syllabus and

syllogism. The word "jurisdiction" in such a case as this is a cloak for allocating the functions of various courts in the orderly administration of bankrupt estates within the scheme established by Congress. *Cf. Palmer* v. *Massachusetts*, 308 U.S. 79, 83 (1939). Its content must be determined on that basis.

When the distinction between the two types of jurisdiction is kept in mind, the inapplicability of most of the cases relied upon by the respondents becomes apparent. Great stress is put on them as establishing that "jurisdiction" follows from possession. This may be true, so far as jurisdiction to entertain a reclamation petition is concerned. It does not follow, we contend, that possession is the touchstone to jurisdiction of the sort which is involved in this case, namely, jurisdiction in the lessee's bankruptcy to administer the lessor's property.

Before proceeding further, it should be pointed out that there is serious question whether the property here involved, namely, the reversionary interest of the Boston and Providence, was in the possession of the Connecticut court. The arguments may be briefly summarized: (1) Upon rejection of the lease, the Old Colony–New Haven trustees continued the operation of the property, but as agents of the Boston and Providence trustees who were then entitled to the property, with the consequence that the property is in law in the possession of the Massachusetts court. (2) While the operation and possession is that of the New Haven trustees under Order No. 217 (R. 208, 210), the claims alleged in petition for Order No. 301 involved in this case are claims of the Old Colony trustees. The facts thus fall squarely within the cases which hold that possession of a bankrupt's property by a third person

is deemed the constructive possession of the bankrupt's trustees and gives the bankruptcy court exclusive jurisdiction to determine all claims relating to the property. See *Taubel-Scott-Kitzmiller Co., Inc.*, v. *F* , 264 U.S. 426, 432 (1924); *Miller* v. *Nugent*, 184 U.S. 1 (1902); *In re Diamond's Estate*, 259 Fed. 70 (C.C.A. 6th, 1919); *Orinoco Iron Co.* v. *Metzel*, 230 Fed. 40 (C.C.A. 6th, 1916). (3) Finally, there is the argument that possession under the lease did not give the Connecticut court possession of the reversionary interest owned by the Boston and Providence. This argument is supported by *Magnolia Petroleum Co.* v. *Thompson*, 106 F. (2d) 217 (C.C.A. 8th, 1939), now pending in this Court after argument. The court held that the conveyances upon which the trustee there relied granted only an easement, and then said (p. 228): ". . . it follows that the possession of the trustee and his grantors under the deed did not extend to the oil and gas underlying the land." See also *In re Manhattan Piggly-Wiggly Corp.*, 296 Fed. 944, 945 (S.D. N.Y. 1923), where the court referred to the separate possession of a leasehold interest, saying: "The possession of the lease, a chattel real, passed to the receiver, like the possession of any other chattel."

It is also far from clear that § 77 proceeds in terms of possession and that decisions under the earlier acts defining jurisdiction in terms of possession are applicable under the new section. Section 77 gives the bankruptcy court "exclusive jurisdiction of the debtor and its property wherever located." It thus deals in terms of title and extends the jurisdiction of the bankruptcy court to property owned by the debtor even though it is not in its possession. It may be contended that § 77 operates as well to restrict jurisdiction so as to exclude property in the possession of the debtor which the debtor does not own. This is the view taken by at least one text writer. See Gilbert's Collier on Bankruptcy (1937) 1467: "Sec. 77 thus shifts from the

former bankruptcy notions of possession to that of title in determining the court's jurisdiction over the debtor's property and its consequential power to control it."

We do not waive these arguments, but they become immaterial if the distinction which we suggest between (1) the merely preliminary jurisdiction arising from possession, and (2) jurisdiction to deal with the property in the administration of the debtor's bankrupt estate, is valid. Under that analysis, even though the Connecticut court had possession, and even though § 77 still turns in part upon possession, the jurisdiction resulting from possession is not broad enough to sustain the relief sought in this case. The argument in support of this position is presented in the following Point.

II

The Connecticut Court Did Not Have Jurisdiction in a Summary Bankruptcy Proceeding Over the Boston and Providence or its Trustees or to Administer its Property

(*A*) *Property which does not belong to the debtor is not subject to administration in the debtor's bankruptcy*

When the bankruptcy court comes to the administration of the debtor's estate, the only property which it has power or "jurisdiction" to administer is the debtor's property. This is a point so obvious that it is difficult to find authority to support it. Indeed, it seems likely that the paucity of cases on the precise subject now before the Court arises from the fact that no one before has ever imagined that the interest of a lessor is subject to the summary ministrations of the lessee's bankruptcy court.

The fact of possession has nothing to do with the court's jurisdiction to administer the property in bankruptcy. This is established by the many cases which have allowed the

owners of property to reclaim their property though it was in the possession of the debtor at the time of bankruptcy.

This obvious and necessary limitation upon the jurisdiction of the bankruptcy court when it comes to the administration of the bankrupt's estate, has been recognized by this Court in a proceeding under § 77. In *Ex parte Baldwin*, 291 U.S. 610, 615 (1934), this Court said with respect to the section now involved: "All property in the possession of a bankrupt *of which he claims the ownership* passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy." (Italics ours.) The Court thus plainly recognized that property does not become subject to administration under § 77 merely because it was in the possession of the debtor, if the debtor claims no ownership in it.[2] Only by recognizing such a rule "can we avoid anomalous encroachments upon vested rights and interests." *Duparquet Co.* v. *Evans*, 297 U.S. 216, 223 (1936).

This rule is fully applicable to the lessor's interest in property which was in the possession of the bankrupt under the lease. Thus, in *General Motors Acceptance Corp.* v. *Horton*, 85 F. (2d) 452, 453 (C.C.A. 3d, 1936), the court said:

> If the transaction was a conditional sale, title to the automobile was in the lessee and passed to its trustee in bankruptcy as of the date of the filing of the petition; but if the contract was a lease, *title did not pass and the property belongs to the appellant.* (Italics ours.)

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[2] The statement in *Ex parte Baldwin* (p. 617) with respect to "the right of trustees or receivers to protect their possession or title through proceedings in the bankruptcy court" must be read in the light of the earlier reference in the opinion (p. 616) to "exclusive jurisdiction acquired by the bankruptcy court through taking possession of the interurban railway *under claim of title.*" (Italics ours.) In the present case, there is no possible basis for any "claim of title" to the property of the Boston and Providence at the time of the New Haven bankruptcy; and no such claim has been asserted.

A similar question was involved in *In re Wil-Low Cafeterias, Inc.*, 95 F. (2d) 306 (C.C.A. 2d, 1938), certiorari denied, 304 U.S. 567 (1938). This was an application by the lessor for an order directing the debtor to vacate the leased property. The court, construing the provisions of the lease, found that it had terminated, and said: "The appellant is entitled to an order for the surrender and possession of the premises." See also *In re Chase Commissary Corp.*, 11 F. Supp. 288, 13 F. Supp. 83 (S.D. N.Y. 1935). In the first of these opinions the court directed that the lessee make payment for the use of the property or "vacate the premises withouf further order of the court."

The correctness of this conclusion with respect to leased property is recognized by text writers in this field. Thus, Finletter, Law of Bankruptcy Reorganization (1939) 139, says:

> It is important however to note that in the case of intangible rights which represent less than the complete ownership of the res, the "property" which is subject to the jurisdiction of the court is only the interest of the debtor in the asset.

The distinction between the jurisdiction over the lessor's interest acquired by possession of the premises, and jurisdiction to deal with the property in the bankruptcy proceedings, is clearly stated in *Green* v. *Finnegan Realty Co.*, 70 F. (2d) 465, 466 (C.C.A. 5th, 1934), where the court said:

> The court through its officer having chosen to reject the lease, had neither rights nor obligations under it. In strict law it had no better right to occupy the premises against a lawful demand of the person entitled to possession than a private person would have. It is true that the owner's remedy is different. He could not without coming into contempt of court eject

> the court's officer by force, nor proceed against him for a forcible detainer, nor throw the property in the custody of the court out of doors; but he could at once petition the court for possession and the court would be bound to do justice according to the circumstances.

Thus, the court has jurisdiction to determine whether the property is the property of the debtor. Once it appears that the property is not the property of the debtor, there is no further jurisdiction to deal with the property in the bankruptcy proceedings.

The correctness of this view is also established by cases involving other situations where property is in the possession of the debtor, but not owned by him. This was essentially the question in *Magnolia Petroleum Co.* v. *Thompson*, 106 F. (2d) 217 (C.C.A. 8th, 1939), now pending before this Court after argument. The Circuit Court of Appeals there held that the bankrupt owned only a right of way over the premises in question. Having made this determination, it held that the District Court "was without jurisdiction to make the order appealed from; and that the order was wholly void." 106 F. (2d) at 228. Perhaps it should have been held in that case that the District Court had jurisdiction to determine the disputed question of title to the property and to enter such orders as were necessary for the preservation of the property pending the settlement of that dispute. But once the question of ownership was settled adversely to the bankrupt, then it is submitted that the Circuit Court of Appeals in that case was correct in holding that the property was not subject to the further order of the bankruptcy court. A similar problem was involved in *In re Lake's Laundry, Inc.*, 79 F. (2d) 326 (C.C.A. 2d, 1935), certiorari denied, 296 U.S. 622 (1935). The property there was in the *possession* of the bankrupt under a conditional sale. The court held, however, that the prop-

erty was not subject to administration in a proceeding under § 77B, and ordered that it be returned to the vendor.

The opinion in *In re Commonwealth Bond Corp.*, 77 F. (2d) 308 (C.C.A. 2d, 1935), presents a discussion which is very closely analogous to the question here. In that case the petitioner sought permission to bring a suit in a state court with respect to property held by the debtor as trustee. The court allowed this, saying (p. 309):

> In this he was clearly within his rights; the trust property is not the debtor's property, the "certificate holders" are not its creditors; no reorganization can include either. It is in no sense ancillary to the purposes of bankruptcy that the property of others should be administered along with the bankrupt's; . . . Gamble v. Daniel, 39 F. (2d) 447 (C.C.A. 8), may appear contradictory, and perhaps it is; but we are disposed to think otherwise. It is true that the district court was affirmed in taking out of the very maw of a state court the property of an insolvent company subject to the Bankruptcy Act. Further, the court refused to limit its order to that part of the mingled assets which belonged to the bankrupt; it took the whole mass, that which it held personally along with that of which it was trustee. Yet that was not to assert a power to administer the fiduciary assets; it is an entirely rational distinction to insist that though the District Court may seize all the property and must do the separating itself, after separation it must remit the trust properties to the state court for administration. Right or wrong, Gamble v. Daniel went no further than the first step, which need not concern us here. . . . It is quite true that we have recently several times decided that under this section the district court may in some circumstances control lienors who hold property of

> the debtor in their possession. . . . But the power so exercised was necessarily founded upon the possibility of bringing the security, suits against which were enjoined, within a plan of reorganization. Stays must be ancillary to the main purpose of the proceeding and are not lawful when they cannot contribute to execution of the plan. Since property held by the debtor as fiduciary cannot be included, suits confined to its administration may not be stayed.

The discussion of the case of *Gamble* v. *Daniel* in this quotation seems very close to the question involved here. The jurisdiction of the District Court there, which "went no further than the first step," is similar to the jurisdiction of the Connecticut court here. But the presence of that jurisdiction does not mean that the property is subject to administration in the bankruptcy suit. Thus, in *In re Prudence Bonds Corp.*, 79 F. (2d) 212, 215 (C.C.A. 2d, 1935), the court said: "It is property of the debtor which the court administers in reorganization proceedings." Similarly, in *In re Prudence Co., Inc.*, 82 F. (2d) 755, 757 (C.C.A. 2d, 1936), certiorari denied, 298 U.S. 685 (1936), the court said: "As in each instance the trust res is not the property of this debtor, it is no part of the property *within the jurisdiction of the court in these proceedings and so subject to its orders.*" (Italics ours.) And in *Thomas* v. *Woods*, 173 Fed. 585, 592 (C.C.A. 8th, 1909), the court said: "Bankruptcy can only deal with what in law belongs to the bankrupt."

The principle involved becomes clear when the question of jurisdiction is examined from another point of view. If we assume that the Boston and Providence properties had been subject to a mortgage, and that foreclosure proceedings had been started in another federal or state court during

the pendency of the Old Colony reorganization proceedings, or if a creditor of the Boston and Providence had attached its property, it could not seriously be contended that the Connecticut court would have had the power to enjoin the prosecution of such proceedings.[3] The lack of jurisdiction in such a case would seem to show that the property of the Boston and Providence is likewise not subject to the jurisdiction of the Connecticut court in the present proceeding.

What we have here is simply a claim by the Old Colony trustees against the Boston and Providence. The situation is parallel to that involved under § 77B in *United States* v. *Tacoma Oriental S.S. Co.*, 86 F. (2d) 363, 368 (C.C.A. 9th, 1936). The court there quoted with approval the statement made in *In re Prudence Bonds Corp.*, 75 F. (2d) 262, 263 (C.C.A. 2d, 1935), that "Congress did not intend the bankruptcy court in proceedings under section 77B to take over all litigation between the debtor and third persons," and said:

> *Unless the debtor's property is involved* no jurisdiction extends beyond the District Court's boundaries. (Italics ours.)

There are a few bankruptcy cases involving leased property which may be relied upon by the Old Colony–New Haven trustees. They do not support the contention made in the court below that when a bankruptcy court has taken custody of leased premises "its jurisdiction over the prop-

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[3] In *Ex parte Baldwin*, 291 U.S. 610 (1934), where this Court held that the bankruptcy court had power to enjoin a proceeding against property owned by the lessor, the lessor was itself in bankruptcy as a subsidiary of the lessee in the lessee's proceeding under § 77. See Petition for a Writ of Mandamus, No. 19, Original, October Term, 1933, p. 4.

erty is exclusive," with the inference that the bankruptcy court may deal with the lessor's interest in the bankruptcy proceedings. Not all of these cases gave adequate consideration to the nature of the interests involved. In all of them, however, the action of the court was temporary, and directed towards the preservation of the lessor's interest which was before the court. Thus, in *In re Chambers, Calder & Co.*, 98 Fed. 865 (D. R.I. 1900), the decision involved the right of a landlord to maintain a proceeding in the state court for the recovery of property leased by the bankrupt. The point decided, therefore, amounts to no more than that the proper way to proceed is through a reclamation petition in the bankruptcy court. Moreover, it appeared that the bankrupt had a large quantity of goods within the leased premises which could not be safely packed and removed within less than four weeks. The court, while recognizing the right of the landlord, relied upon its incidental equity power (p. 866) "to meet a situation in which the strict and immediate enforcement of a legal right would lead to unnecessary and disproportionate loss to others, or would result collaterally in conferring an inequitable advantage. A court of equity, *while giving the fullest recognition to a legal right*, may so regulate the time and manner of its enforcement as not to cause unnecessary loss to others." (Italics ours.)

Similarly, the case of *In re Kleinhans*, 113 Fed. 107 (W.D. N.Y. 1902), concerned the question of a reasonable time within which a landlord might repossess his property then in the hands of the bankruptcy court, and the power of that court to enjoin summary proceedings in another court, the prosecution of which would be detrimental to the estate. In these cases the court's power was derived from its bankruptcy jurisdiction over the lessee's interest and its jurisdiction to take action to prevent unnecessary injury to the debtor's estate, and not from any jurisdiction to deal di-

rectly with the lessor's interest in the leased property.[4] The legal rights of the landlords in each of these cases were recognized and compensation was reserved to them for the delay resulting from the bankruptcy court's action. To the same effect is *In re Schwartzman*, 167 Fed. 399 (D. S.C. 1909).

In the case of *In re Adams*, 134 Fed. 142 (D. Conn. 1905), the leasehold interest of the bankrupt and the right to possession under the lease were the interests which were held to be subject to the judgment of the trustee in bankruptcy under the guidance of the referee. The court was dealing only with the property of the debtor which was before it.

These cases are simply illustrations of the rule applied by this Court in *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648, 681 (1935), where it said: "The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy." The power of the bankruptcy court to regulate the exercise of a landlord's rights so as to prevent unnecessary injury to the bankrupt estate falls far short of the power claimed by the Old Colony–New Haven trustees to be vested in the Connecticut court to adjudicate claims against the lessor, and to impose liens upon the landlord's estate.

(B) This rule is applicable in proceedings under Section 77

When the New Haven reorganization petition was approved, the Connecticut court acquired "exclusive jurisdiction of the debtor and its property wherever located."

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[4] "This interference with the rights of the other party is in no sense an exercise of jurisdiction over the subject matter of the contract or over the property covered by the lease: it follows from the control of the court over the debtor's contract right or leasehold interest." Finletter, Law of Bankruptcy Reorganization (1939) 141.

Section 77(a); *infra*, p. 48. This provision gives the bankruptcy court comprehensive jurisdiction over the debtor's property; it is plainly not broad enough to give the Connecticut court jurisdiction over the Boston and Providence and *its* property. The only property over which the Connecticut court acquired jurisdiction for the purposes of bankruptcy administration was the property of the New Haven (and later of the Old Colony), and so far as the Boston and Providence is concerned, that consisted solely of a lessee's interest in the Boston and Providence line. This was subject to adoption or rejection as the Old Colony trustees might elect. In either event, the leasehold was the only interest in the Boston and Providence properties which the Connecticut court could administer for the benefit of Old Colony and New Haven creditors. Whatever right to possession and use of the Boston and Providence properties the Connecticut court had was derived solely from the lease.

Section 77 extends the jurisdiction of the bankruptcy court to property owned by the debtor, even though it was not in its possession. But there is nothing in § 77 which extends the jurisdiction of the bankruptcy court to administer property in the possession of the debtor which it did not own. The legislative history makes it clear that the lessor and its property cannot be brought into the bankruptcy proceeding of the lessee. When § 77 was first enacted in 1933, it contained express provision allowing (1) any subsidiary of a principal debtor, or (2) any company "substantially all of whose properties are operated by such a debtor under lease or operating agreement" to file a petition in the same proceeding. Act of March 3, 1933, c. 204, § 77(a), 47 Stat. 1467, 1474. When such a petition was filed by a subsidiary or a lessor, the statute expressly gave the court the same jurisdiction over the petitioner and its property as it had with respect to the principal debtor. If this statutory provision had remained in force, the Boston and Providence

could have filed a petition in the New Haven and Old Colony proceedings in Connecticut, and the Connecticut court would thereupon have acquired exclusive jurisdiction over the Boston and Providence and its property, and the property of the Boston and Providence would have been subject to administration in the bankruptcy proceeding in Connecticut.

But this statute did not remain unchanged. By the Act of August 27, 1935, c. 774, 49 Stat. 911, § 77(a) was amended so as to eliminate entirely all reference to jurisdiction over lessor companies, while retaining the provision for jurisdiction over subsidiaries. We have, thus, the argument of *expressio unius est exclusio alterius*. Congress by specifically including a provision as to subsidiary companies has indicated its intention that the property of subsidiaries but not of lessors may be brought within the administration of the principal reorganization court. And this is made explicit, and not a mere matter of inference, by the elimination from the statute of the specific reference to lessor companies which had previously been included there.[5] The statute thus makes it clear that the Boston and Providence could not be reorganized in the Connecticut court. The

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[5] The provision for a petition by lessor companies was cut out of the act in the bill reported by the House Judiciary Committee on June 21, 1935. See House Report No. 1283, 74th Congress, 1st Session, p. 10.

This change takes on a particular significance in the light of the corresponding provision as to non-railroad corporations in § 77B and chapter X. Section 77B(a) contained a sentence similar to that in the original § 77(a) under which a subsidiary or a corporation "substantially all of whose properties are operated by such debtor under lease or operating agreement" might file a petition in the original proceeding. No change was made in this until the enactment of the Chandler Act in 1938. The latter act introduced a change of form but made no alteration of substance. In § 106(13) of chapter X a new definition of "subsidiary" is introduced, including "a corporation substantially all of whose properties are operated under lease or operating agreement." Then in § 129 it

general rule that property of a lessor cannot be dealt with in the administration of the lessee's bankrupt estate is thus strongly re-enforced under § 77.

There is no other provision of § 77 which points to a different conclusion. Section 77(c)(6)[6] was advanced by the District Court as implying the duty of the New Haven trustees to operate the Boston and Providence, and from this implication it was inferred or assumed that the Connecticut court was the proper tribunal to determine the accounts of such operation and to impose a lien for a deficit. Neither the implication nor the inference seems warranted. In the first place, § 77(c)(6) has not come into operation in this case. By its terms, it applies only "if the lessee . . . shall elect no longer to operate the leased line." In such a case, the judge is to fix a period at the end of which the lessor shall "begin the operation of such line," unless the lessor in turn files a petition and the judge finds that "it would be impracticable and contrary to the public interest for the lessor to operate the said line." Only then does the

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is provided that a petition may be filed by or against a "subsidiary" either at the place of the subsidiary's principal place of business or in the court in which the parent's proceeding is pending. Act of June 22, 1938, c. 575, 52 Stat. 840, 884, 886.

There is thus a plain difference between the provisions as to railroad lessors in § 77 and non-railroad lessors in § 77B and chapter X.

[6] Section 77(c)(6) reads as follows:

"If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended."

statute provide that the lessee shall "continue operation on or for the account of the lessor." None of these events has happened in this case. Until the time fixed as specified in the statute has arrived, the duty of operation is cast, by the plain words of the Act, upon the lessee. Until that time, the statute gives no basis for the conclusion that the lessee is to operate "on or for the account of the lessor."

The duty of the New Haven to operate the Boston and Providence properties needs no implication. It does not arise out of § 77. It was, and for many years has been, an express duty imposed both by the law of Massachusetts and of the United States. Mass. Gen. Laws (Ter. Ed.) c. 159, § 16, and § 16A, added by Mass. Laws 1938, c. 243; Mass. Gen. Laws (Ter. Ed.) c. 160, §§ 128, 129; Interstate Commerce Act, § 1 (18), as amended by the Transportation Act, 1920, c. 91, 41 Stat. 456, 477.[7] See *Palmer* v. *Massachusetts*, 308 U.S. 79, 82 (1939). The lease to the Old Colony transferred to it, and through it to the New Haven, not only the physical property of the Boston and Providence, but also its franchise (R. 73). And the franchise carried with it not only the privilege to operate, but also the public duty to operate. The only effect that § 77 of the Bankruptcy Act had on the obligations existing under the lease was: (1) to afford relief to the debtor from payments of rent and other obligations to the lessor under the lease, by allowing the lessee debtor to disaffirm and reject the lease; and (2), under subsection (c)(6), to afford relief to the debtor lessee from its obligation to operate the leased road, if a certain pro-

[7] This latter provision reads as follows:

"Section 1(18). Extension or abandonment of lines; certificate required.— . . . and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, *or the operation thereof*, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." (Italics ours.)

cedure is followed, under certain conditions which have not been met in this case, and subject ultimately to the approval of the Interstate Commerce Commission.

Section 77 imposed no new duties or burdens on the New Haven. Rather, it gave it a means to escape an existing burden on terms which the New Haven has not seen fit to follow. There is thus no basis for arguing that it must have granted compensatory rights and remedies, since it imposed no burden.

Section 77(c)(6) makes no provision for the fixing of deficits or the determination of liens. Even if its terms had been complied with, so that the provision for operation "on or for the account of the lessor" had come into force, there is nothing in the statute which is even the basis for an inference as to the court which shall have jurisdiction to determine the account and adjudge its consequences. The trustees of the New Haven may present their account to the Massachusetts court, and if it appears that their claim is well founded, they will be entitled to all relief which shall be proper. There is nothing whatever in § 77(c)(6) which suggests that this adjudication is the exclusive prerogative of the Connecticut court.

Another provision upon which reliance has been placed is § 77(c)(10).[8] This paragraph provides for segregation

[8] Section 77(c)(10) reads as follows:

"The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate."

and allocation of earnings and expenses between various parts of a railroad, including those which are separately subject to lease. But this affords no basis for inferring that the lessor's interest in the leased property is subject to the bankruptcy court's administration. A segregation that did not deal with the entire system revenues and expenses, including those pertaining to the leased lines, would be useless for purposes of reorganization, and probably impossible to prepare. Moreover, there are many situations in which segregation and allocation may be directly applied by the court in the original proceedings. This is true, for instance, as between the New Haven and the Old Colony. The Old Colony, being a subsidiary of the New Haven, is properly before the Connecticut court under the provisions of § 77(a).[9] Section 77(c)(10) has obvious application with respect to a leased line where the lease is still in effect. In such a case, the segregation formula is necessary to aid the court to determine the value of the lease to the debtor. But this does not mean that the lessor's interest is subject to the administration of the court.

That § 77(a) was not intended to give the bankruptcy court jurisdiction in the administration of the property of a lessor of the debtor seems to be clearly indicated by an amendment which was made to § 77(j) in the 1935 revision of the statute. Congress at that time added a specific provision that "the title of any owner" to leased equipment "shall not be affected by the provisions of this section" (see p. 51, *infra*). It was thus made plain that the rights of lessors of equipment would not be disturbed by the act, specifically, that the lessor's interests would not be subject to administration by the lessee's bankruptcy court. This singling out of equipment lessees without any reference to leases,

[9] The application of segregation formulae under § 77(c)(10) in this situation was passed upon in *Palmer* v. *Palmer*, 104 F. (2d) 161 (C.C.A. 2d, 1939), certiorari denied, October 16, 1939.

of land might at first seem to lead to an inference against our position; but the contrary is plainly established by the legislative history of the amendment. At the Hearings before the House Judiciary Committee, Mr. Leslie Craven, who was counsel for the Federal Coordinator of Transportation and the draftsman of the bill, stated that this amendment to § 77(j) did not "change the right of the owner of that equipment. We simply negative any possibility that this act will be so interpreted as to change that right. . . . We have not tried to [alter those rights]. We simply recognize them as they are; that is the clear import of that language." Hearings before the House Committee on the Judiciary on H.R. 6249; 74th Congress, 1st Session, April 16, 1935, p. 61. The fact that this new provision as to equipment was merely declaratory of existing law, shows that the title of lessors of real property should likewise "not be affected by the provisions of this section." Certainly the statute gives no basis for the conclusion that when the court acquired jurisdiction over "the debtor and its property" it acquired and retained jurisdiction over property which the debtor never owned and has now rejected. Indeed, the New Haven, which is the real claimant here, rejected its lease on June 1, 1936 (R. 29), and thus lost all interest in the property before the date of the first charge in Petition for Order No. 301, which is June 4, 1936 (R. 219).

Section 23 of the Bankruptcy Act is another provision which confirms our construction of § 77.[10] Section 23 is applicable to proceedings under § 77. See § 77(l); *infra*, p. 51. The exact scope and effect of § 23 are far from clear.

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[10] Section 23 as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840, 854, reads as follows:

"Sec. 23. *Jurisdiction of United States and State Courts.*—a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by

It would seem at least by analogy to show that Congress did not contemplate that the Connecticut court would have jurisdiction to entertain such a proceeding as that involved here. In *Thompson* v. *Terminal Shares, Inc.*, 104 F. (2d) 1, 9 (C.C.A. 8th, 1939), certiorari denied, October 9, 1939, the court made specific reference to § 23 in denying jurisdiction. It said:

> To sustain the lower court's jurisdiction of this suit would do violence to the general policy of Congress that persons shall not be subjected to civil suits except in the districts of which they are inhabitants . . . The language used by Congress in Section 77, in conferring jurisdiction upon the courts of bankruptcy, does not, in our opinion, indicate any intention to abandon that policy with respect to such suits as this.

The applicability of § 23 to proceedings under § 77 is emphasized by the specific provision in the new chapter X of the Bankruptcy Act, which makes § 23 inapplicable to ordinary corporate reorganization proceedings.[11] This

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the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."

[11] Section 102 of the Bankruptcy Act as enacted by the Act of June 22, 1938, c. 575, 52 Stat. 840, 883, reads in part as follows:

"The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That section 23 . . . shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. . . ."

makes it plain that § 23 remains a relevant factor in the proper construction of § 77. *Cf.* Finletter, Law of Bankruptcy Reorganization (1939) 184.

(C) The jurisdiction of the Connecticut court is not aided by its status as a receivership court

Under § 77(a) the reorganization court is also granted "all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose." This provision does not confer upon the Connecticut court jurisdiction to impose a lien upon the property of the Boston and Providence. Few things are more clearly established than the rule that a receivership court does not have jurisdiction over property beyond its territorial limits. This point was conceded by the respondents in the court below.[12] There seems no reason for discussing it further here.

The position of the court below as a receivership court is not aided by cases which deal with the "rule of practice" under which an ancillary court in receivership proceedings paid deference to the decrees of the principal receivership court. *Ames* v. *Union Pacific Ry. Co.*, 60 Fed. 966 (C.C. E.D. Neb. 1894); *Ames* v. *Union Pacific Ry. Co.*, 74 Fed. 335 (C.C. D. Neb. 1896); *Farmers Loan and Trust Co.* v. *Northern Pacific R. Co.*, 72 Fed. 26 (C.C. 1896). Such cases necessarily recognize that the actual jurisdiction over the property is in the ancillary court. But the real answer is the fact that there is no question here of primary and

[12] In their brief in the court below, the respondents said (p. 38): "It is true these orders could have no *in rem* effect on extraterritorial property." And (p. 39): "It is probably true that these orders could not of their own force alone, have established a lien on property outside the territorial jurisdiction of the courts which made them."

ancillary receivership. The District Court in Massachusetts is not in the position of an ancillary court in the New Haven reorganization; it is not merely another court which happens to have more direct and immediate authority over certain property of the New Haven than does the court of primary reorganization. The Massachusetts court is itself the primary court in the reorganization of the Boston and Providence. Imposition of the lien on the Boston and Providence property will not involve merely an ancillary enforcement of an order of a court of primary jurisdiction. The court in Massachusetts is directing an independent and competing reorganization, indeed, as to Boston and Providence property, a superior and "exclusive" reorganization. The Connecticut court's equity receivership powers do not give it jurisdiction to make orders which will bind the Massachusetts court.

Indeed, the territorial limitations upon the Connecticut court's position as a receivership court seem to be the clue to the whole case. The claim which Petition for Order No. 301 seeks to assert is one which has grown up wholly in equity receivership proceedings. It is not necessary to discuss the merits of that claim here. So far as the right to recover from the lessor or to place a lien upon its property has any validity, it is the creature of equity developed in equity receivership proceedings. See *Mercantile Trust Co.* v. *Farmers Loan and Trust Co.*, 81 Fed. 254 (C.C.A. 8th, 1897); *Pennsylvania Steel Co.* v. *New York City Ry.*, 198 Fed. 721, 730-734 (C.C.A. 2d, 1912). But these cases involve no question of jurisdiction. In them, the lessor's and the lessee's estates were both in receivership in the same proceeding with the same receivers administering both estates. The question is treated as one arising out of the administration of the property, and it is on the ground that it is an "administration expense" that it is held to be entitled to priority. But the Connecticut court has no power

to administer the property of the Boston and Providence. The equity receivership cases, on which the present claim is founded, obviously furnish no foundation for the effort of the Connecticut court here to impose a lien on property beyond its jurisdiction.

The respondents are asserting what is fundamentally an equity receivership right against property which is not property of their debtors; they must take it subject to the territorial limitations on the Connecticut court's jurisdiction to act as an equity receivership court. If the respondents in this case have a claim arising out of the operation of the Boston and Providence Railroad, it is a claim which must be asserted in a plenary proceeding; and so far as they contend that their claim constitutes a lien on certain property, they must make their claim before a court having power to administer that property. Such a proceeding can only be brought in Massachusetts. The Massachusetts court will have jurisdiction over the property in question, and if the facts are such as to warrant the imposition of a lien, that court will have power to impose the lien and enforce it as well.

It should not be overlooked that the claim in this case is one which has arisen in its entirety after the bankruptcy of the Old Colony. The claim did not exist at the time of the bankruptcy of the New Haven or when the Old Colony joined in those proceedings. It arose out of the operation of the Boston and Providence by the New Haven trustees *after* the bankruptcy of the Old Colony. As such, it is not and cannot be "property of the debtor" within § 77(a). It is a claim of the trustees in their administration of the estate and not an asset of the estate for distribution to creditors.

The court below, in referring to the lien, said that the Connecticut court had " 'exclusive jurisdiction' over the 'property wherever located' of the New Haven and of the

Old Colony. The lien is as much their 'property' as the encumbered fee is the Boston and Providence's." (R. 309.) This seems to be a clear case of judicial boot-strap lifting. *First*, it overlooks the fact that the claim in question is not property of the New Haven or of the Old Colony, but is a claim arising in favor of the trustees and thus not within the jurisdictional provisions of § 77. *Second*, any lien that may be imposed in this case will be imposed as a matter of remedy. It can only be imposed after the existence of a deficit has been established and by a court which has jurisdiction to impose it. To assert that a lien is property within the jurisdiction of the court when no lien can be created unless the court has jurisdiction is seemingly to engage in a question-begging circle. It *proves* the preliminary but necessary element of jurisdiction by *assuming* the very point to be proved on the merits. The obvious answer would seem to be that the only court which can impose a lien on property is the court which has jurisdiction over the property; and that court in this case is the Massachusetts court. This is essentially what was decided in *Thompson* v. *Terminal Shares, Inc.*, 104 F. (2d) 1 (C.C.A. 8th, 1939), certiorari denied, October 9, 1939, where the debtor likewise was claiming a lien.

The court below seems to recognize the weakness of its own decision when it says (R. 308): "It may possibly be true that the Connecticut Court will have to resort through its trustees to the Massachusetts Court to realize upon the lien." It is a strange kind of "jurisdiction" which enables a court to create a lien but not to enforce it. Since the lien in this case is purely remedial, it would seem that power to enforce it was of the essence, and that a concession that the Connecticut court does not have jurisdiction to enforce the lien should have led to the conclusion that it has no jurisdiction to establish it. Why should the Connecticut court from the standpoint of practical bankruptcy administration

have jurisdiction to impose a lien which it cannot enforce? "The foundation of jurisdiction is physical power." *Ex parte Indiana Transportation Co.*, 244 U.S. 456, 457 (1917). If the Connecticut court cannot enforce the lien, it would seem to follow that it should not have jurisdiction to create it.

(D) The claim of jurisdiction to determine the priority of the lien is obviously excessive and demonstrates the invalidity of the whole claim of jurisdiction

The petition with which this proceeding was begun prays for the imposition of a lien on the property of the Boston and Providence, which shall be "prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said company . . ." (R. 216-217.) These were the terms of the order which the District Court actually entered in this case. It seems obvious that the effort to determine the priority of the lien was wholly beyond the jurisdiction of the Connecticut court. The Connecticut court did not have before it the other persons who might have claims against the Boston and Providence and liens upon its property. It has no power to bring such claimants before it, for it is not administering the property of the Boston and Providence in bankruptcy. The Connecticut court cannot have jurisdiction to determine the priority of the liens as against claimants who are not and cannot be before it.

Once it is granted that the Connecticut court cannot determine the priority of the lien in question, it would seem to follow, and especially as a matter of practical bankruptcy administration, that the Connecticut court should not have jurisdiction to determine the existence of the lien either. A jurisdiction *in rem* which is sufficient to allow the determination of a lien but not sufficient to establish its

priority, or to enforce it, is rather hard to picture. It is certainly not consistent with the practical and efficient working of bankruptcy administration, which should be the key to jurisdiction in such a case as this. The whole matter would seem to lie within the jurisdiction of the Massachusetts court, which alone can bring all parties interested in the Boston and Providence estate before it, and determine all questions in the matter, including priorities, and which alone can effectively administer the property of the Boston and Providence. This aspect of the matter is discussed further at pp. 40-42, below.

III

Exclusive Jurisdiction over the Boston and Providence and its Property is Now Vested in the District Court in Massachusetts

The preceding part of this argument has for the most part been directed towards the question of the jurisdiction of the Connecticut court, apart from the fact that the Boston and Providence is now itself in reorganization under § 77 in the District Court of Massachusetts. Even if the Connecticut court would have had jurisdiction over the claim and lien in question as long as the Boston and Providence remained out of bankruptcy, we submit that that jurisdiction has now ceased, and that the District Court in Massachusetts alone has jurisdiction.

This would seem to follow from the plain language of § 77(a) of the Bankruptcy Act. By the express terms of that statute, the District Court for the District of Massachusetts, upon the approval of the petition for the reorganization of the Boston and Providence, acquired "exclusive jurisdiction of the debtor and its property wherever located." When the Massachusetts court acquired "exclusive jurisdiction" of the Boston and Providence and its

property, whatever jurisdiction the Connecticut court may have had necessarily ceased.[18] The Connecticut court never had any jurisdiction over the trustees of the Boston and Providence. We have contended above that it did not have jurisdiction over the property of the Boston and Providence. But even if that contention should fail, § 77(a) seems to require the conclusion that after the approval of the petition by the Massachusetts court, the Connecticut court ceased utterly to have any jurisdiction over the Boston and Providence or its property.

The sweep of the words of the statute is emphasized by their brevity. The grant to the Massachusetts court is of "exclusive jurisdiction of the debtor and its property wherever located." It is hard to see how these words can fairly be limited in their operation, particularly when their setting is considered.

The purpose of § 77 was to provide a single court for the reorganization of railroad corporations and thus to do away with the system of ancillary receiverships and the delays and conflicts to which they gave rise. When § 77 came into the statute, the Committee Report of the House Committee on the Judiciary referred to the "protracted period" of administration in equity receiverships, and the "duplication of expense incident to ancillary receiverships." The remedy offered was the present § 77, which sought to eliminate all this by giving the judge "jurisdiction of the debtor's property wherever located." House Report No. 1897. 72d Congress, 2d Session, p. 5. The elimination of

[18] For this reason, the fact that the Boston and Providence had filed a petition to intervene in the New Haven proceedings (R. 62-91) is immaterial. This did not give the Connecticut court jurisdiction over the property of the Boston and Providence in any event. Moreover, the order entered by the court specified that the intervention was only "for the purpose of protecting its rights and the rights of its shareholders and of other persons interested in its property and assets." (R. 91.)

ancillary receiverships through the centralization of jurisdiction in one court was referred to by Senator Hastings, in charge of the Bill, on the floor of the Senate. See 76 Congressional Record, Part 5, pp. 5104-5107, February 27, 1933.

In view of the clear language used by Congress and in view of the circumstances which gave rise to the legislation, there seems to be every reason to believe that when Congress said that the Massachusetts court should have exclusive jurisdiction in this case, it meant that its jurisdiction should be exclusive. In *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648, 683 (1935), the Court said, in respect of § 77: "Jurisdiction over reorganization proceedings, however extensive the railway lines may be, is conferred upon a *single district court.*" (Italics ours.) The only way that jurisdiction can be effectively conferred upon a single district court is by making effective that court's grant of exclusive jurisdiction.

It should be noted that Congress did not provide for the unified reorganization of railroad *systems*. It might have made such a provision, and there may be reason to suppose that it would be desirable or convenient to have one court charged with the responsibility for reorganizing all the elements of an entire system. That is essentially what the Connecticut court is seeking to do in this case. But Congress has made no such provision in the statute. On the contrary, it has provided for the separate reorganization of railroad *corporations*. In the case of subsidiaries, they may be reorganized in the same proceeding with the principal debtor. But, as we have already seen (*supra*, pp. 24-26), the provision which once allowed a lessor to be brought into the lessee's proceeding has been eliminated from the statute. The only place where the lessor in this case may be reorganized is in the District Court for Massachusetts, and Congress has undertaken to make that reorganization effective by endowing the Massachusetts court with "exclusive juris-

diction of the debtor and its property wherever located."

Under the decision below, although the Massachusetts court alone has power under the statute to reorganize the Boston and Providence, it is in fact left no real control over that reorganization. That decision nullifies the chief purpose of the statute in the teeth of its express terms by dividing the desired exclusive jurisdiction into a dual jurisdiction. Contrary to the terms and purpose of the statute, it converts the Massachusetts court into a subordinate tribunal, in effect merely ancillary to the Connecticut court. It elevates the latter into the position of creator of liabilities of the debtor, and emasculates the power of the former, which should be fundamental in any bankruptcy court to determine the existence and amount and priority of liabilities of the debtor. The jurisdiction allowed by the court below to the Connecticut court is not merely obstructive; it is destructive. The inescapable consequence of such a division of jurisdiction must be to destroy in substance the primary court's power to reorganize its debtor. The construction of § 77 by the court below thus negatives the clearly expressed and salutary purpose of Congress.[14] The statement made by this Court in *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648, 676 (1935), seems directly applicable here:

> But a proceeding under § 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end

[14] The failure of the Massachusetts court to enjoin the proceedings in the Connecticut court does not represent its acceptance of an ancillary or subordinate position. It is due, on the contrary, to the Massachusetts court's understandable and proper unwillingness to take steps in the matter until the jurisdictional question is settled in the present proceeding where it was first raised.

> the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile.

This argument is emphasized by a passage in the opinion of the court below. After saying that the Connecticut court might "have to resort through its trustees to the Massachusetts court to realize upon the lien," the court said (R. 308):

> If so, it is because distribution of the Boston and Providence assets—more properly the new allocation of interests in them—has been confided to the Massachusetts court. But that need not affect the power of the Connecticut court to liquidate and fix the rank of the lien.

If the New Haven claim can properly be liquidated by the Connecticut court, and the rank of the lien fixed by the Connecticut court, then the Massachusetts court has only a perfunctory jurisdiction over "the new allocation of interests in" the Boston and Providence property. If the Connecticut court can fix a lien "prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness," it can create a prior lien exceeding the full value of the property.[15] If the Massachusetts court must enforce this, and "allocate" this new interest, it must dispose of all its debtor's property on the say-so of another court. It cannot rank any lien of other claimants ahead of it. It cannot cut down the amount of the lien to give other claimants anything. *Case* v. *Los Angeles Lumber Co.*, 308 U.S. 106 (1939). It cannot even raise money on trustees' certi-

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[15] We are not tilting at windmills. The claims which the New Haven has actually filed with the Connecticut court for its adjudication, through the year 1938, aggregate $6,138,027.56. They are estimated at more than $2,000,000 for the year 1939. Thus the total amount of claims to date awaiting this Court's decision are in excess of $8,000,000.

ficates with which its trustees may finance its defense, in a foreign jurisdiction, against claims for the imposition of a lien upon the property of its own debtor over which Congress purported to give it "exclusive jurisdiction."

The court below argued in its opinion (R. 307) that for the court having possession of the property to await "the action of such other competent tribunals as the claimant may choose" would subject it "to an indefinite delay in the dispatch of the case before it and may effectively cripple its powers." But this would seem to be an argument which applies with conclusive force in favor of the reorganization court having exclusive jurisdiction of the corporation which owns the property. If that court must await the action of possessory courts "to liquidate and fix the rank" of various claims and liens against its property, this will not merely "effectively cripple its powers," but will substantially nullify them. Under such circumstances, the "exclusive jurisdiction of the debtor and its property wherever located" given to the Massachusetts court becomes a hollow phrase. And this is true as a practical matter, too. The claims in question are merely incidental in the New Haven reorganization; in the reorganization of the Boston and Providence they are fundamental. To say in such a case that it is the Connecticut court which has jurisdiction is to allow the tail to wag the dog.

That the plain words of § 77(a) should be given their plain meaning is shown by other provisions of the statute. Thus, § 77(b) gives the reorganization court power to approve a plan of reorganization which may "include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured." The term "creditor" is then defined "for all purposes of this section" as including "all holders of claims *of whatever character* against the debtor or its property." The term "claims" is also defined as including "liens, or other interests *of what-*

ever character." Section 77(b), as amended by the Act of August 27, 1935, c. 774, 49 Stat. 911, 913; italics ours. It is hard to see how Congress could have used language more clearly indicating that it intended the Massachusetts court in this case to have the "exclusive jurisdiction" which the statute in terms gives it. The definitions of "creditors" and "claims" clearly include the very sort of claim which is made here, and show that the Massachusetts court alone was intended to have power to deal with all claims including claims of this sort.

This is confirmed by § 77(c)(7), which provides that "The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced" and "the manner in which such claims may be evidenced or allowed." Since "claims" includes "liens, or other interests of whatever character," it is plain that the orderly procedure for the allowance of claims prescribed by Congress requires that the particular claim involved here be presented to and passed upon by the Massachusetts court.

Another provision of the statute which seems relevant by analogy is § 77(i). This provides that "If a receiver or trustee of all or any part of the property of a debtor has been appointed by a Federal or State court," the debtor may file a petition under § 77. In such an event, the trustees appointed by the bankruptcy court "shall be entitled forthwith to possession of and be vested with title to such property." This section is not directly applicable here. *Duparquet Co.* v. *Evans*, 297 U.S. 216 (1936). It does, however, afford a persuasive argument by analogy. If the "exclusive jurisdiction" was extended by Congress to property which had been taken into custody of "a receiver or trustee," it would seem *a fortiori* to apply to property under the circumstances here. Nothing to the contrary was decided in the *Duparquet* case. The Court there held that the mere

appointment of a receiver in foreclosure proceedings was not ground for filing a petition under § 77(i). But in this case the petition was filed under § 77(a) on the ground that the Boston and Providence was "unable to meet its debts as they mature." The argument by analogy that, since the exclusive jurisdiction of the bankruptcy court supersedes the jurisdiction of a "receiver or trustee," it should *a fortiori* give jurisdiction here, still remains.

The court below was finally reduced to the argument (which had previously been adopted by the District Court) that "we can only resort to the doctrine normally applicable in such cases; i. e., that the court first taking over the res, draws to itself power to determine all claims upon it" (R. 309). This argument is specious; but it is not applicable here. In the first place it assumes that the Connecticut court had jurisdiction to determine the claims in question. We have argued to the contrary in Points I and II above. Even though we be wrong in that contention, however, it does not follow that the Connecticut court retained jurisdiction after the bankruptcy proceedings in Massachusetts were commenced. Despite the assertion of the court below, there is no universal principle "that the court first taking over the res, draws to itself power to determine all claims upon it."

There are many cases in which it has been held that a bankruptcy court supersedes a jurisdiction which has already been obtained by another court. *Isaacs* v. *Hobbs Tie & T. Co.*, 282 U.S. 734, 737 (1931), where many cases are cited. The rule was applied in *Gross* v. *Irving Trust Co.*, 289 U.S. 342, 344 (1933), where this Court said: "The bankruptcy court has exclusive jurisdiction, and that court's possession and control of the estate *cannot be affected by proceedings in other courts, state or federal.*" (Italics ours.) The Court there quoted from *Buck* v. *Colbath*, 3 Wall. 334, 341 (1865), where it was said that no court might interfere with the possession of another court unless it be a court

with "direct supervisory control . . . *or some superior jurisdiction in the premises.*" It was then held that the bankruptcy court's jurisdiction in the *Gross* case "falls within the italicised exception, since the jurisdiction of the bankruptcy court is paramount and not concurrent."

These cases are directly applicable here. The Massachusetts court is exercising bankruptcy jurisdiction. Its jurisdiction is "paramount and not concurrent." It is true that the Connecticut court is also sitting as a bankruptcy court. But it is not administering the property of the Boston and Providence in bankruptcy; the powers it seeks to assert are ordinary equity powers. So far as the property of the Boston and Providence is concerned, the Massachusetts court is the bankruptcy court and has paramount jurisdiction.[16] Even if the jurisdiction of an ordinary bankruptcy court would not supersede the jurisdiction of another bankruptcy court, the Massachusetts court here is not an ordinary bankruptcy court. It is a court acting under § 77, to which Congress has in express terms given "exclusive jurisdiction of the debtor and its property." See *Palmer* v. *Massachusetts*, 308 U.S. 79, 85-86 (1939). There is no case which decides that the § 77 court is not the paramount court with respect to its debtor's property. There is no ground on which the clear mandate of the statute to that effect should be ignored. Only by recognizing the paramount jurisdiction in the Massachusetts court will that Court in fact have "exclusive jurisdiction." Only by recognizing the paramount jurisdiction of the Massachusetts court can the purpose of Congress to achieve a unified dis-

[16] *Cf. Petition of Shortridge*, 20 F. (2d) 638 (C.C.A. 9th, 1927): "Any attempt at a double administration of this estate by two sets of receivers can only result in needless expense, delay, confusion, and unseeming conflict. To prevent just such things, bankruptcy courts were established, and endowed with full and complete jurisdiction to enforce a single and simple administration."

position of the debtor's estate be obtained. Only by recognizing the paramount position of the Massachusetts court can we "give consistency and coherence to the statutory rule." *Duparquet Co.* v. *Evans*, 297 U.S. 216, 224 (1936).

For the same reason, the argument advanced in the court below that the jurisdiction of the Connecticut court over property in its possession includes power to charge the property with expenses resulting from that possession must fall before the exclusive and paramount jurisdiction of the Massachusetts court's bankruptcy powers. This would seem to follow from this Court's decision in *Gross* v. *Irving Trust Co.*, 289 U.S. 342 (1933), *supra*. There, property was taken into the custody of receivers appointed by a state chancery court. There could be no doubt about their possession, nor the validity of their possession. Thereafter, the owner of the property was adjudged a bankrupt. This Court held that the bankruptcy court alone could determine the fees and expenses of the receivership, saying (p. 345): "The jurisdiction of the bankruptcy court being paramount, the power of the state court to fix the compensation of its receivers and the fees of their counsel necessarily came to an end with the supervening bankruptcy. When the bankruptcy court acquired jurisdiction, the sole power to fix such compensation and fees passed to that court."

Furthermore, the expenses here are essentially administration expenses. If the claim has any validity, it arises out of the administration of the Boston and Providence property over a period of years. These are not merely temporary expenditures made for the preservation of perishable property, which the debtor claims to own, during the period of time which is required for determining the validity of that claim. Here the New Haven has no claim of ownership; and it has incurred the expenses in the performance of its own duty to operate the property—a duty which was imposed on it by law wholly apart from the

bankruptcy, and which has not been discharged by any provision of the Bankruptcy Act which its trustees have seen fit to follow.

If there is any lien for such administration expenses, it should be established by the Massachusetts court. That court is the only court which can effectively administer the assets of the Boston and Providence in bankruptcy. The purposes of the act can be subserved only by giving it the "exclusive jurisdiction" which Congress has in terms conferred upon it.

Conclusion

The judgment below is erroneous and should be reversed.

Respectfully submitted,

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March, 1940

Appendix

Excerpts from Section 77 of the Bankruptcy Act, as Amended

Section 77-(a). Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"): *Provided*, That when any railroad, although engaged in interstate commerce, lies wholly within one State, such proceedings shall be brought in the Federal district court of the district in which its principal operating office in such State during the preceding six months or the greater portion thereof has been located. The petition shall be accompanied by payment to the clerk of a filing fee of $100, which shall be in addition to the fees required to be collected by the clerk under other sections of this Act. Upon the filing of such petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall

extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and circuit courts of appeal in exercising the jurisdiction herein conferred upon them. The railroad corporation shall be referred to in the proceedings as a "debtor." Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which such other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of such other debtor; and upon the filing of such petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon such court if it approves such petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders as the court has with respect to such other debtor. . . .

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured; either through the issuance of new securities of any character or otherwise; . . . and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any

other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interest of whatever character. . . .

(c) After approving the petition:

. . . . . .

(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their

respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests. . . .

(i) If a receiver or trustee of all or any part of the property of a debtor has been appointed by a Federal or State court . . . a petition or answer may be filed under this section at any time thereafter by such debtor, or its creditors as provided in subsection (a) of this section, and if such petition is approved, the trustee or trustees appointed under this section, or the debtor until such trustee or trustees are appointed, shall be entitled forthwith to possession of and be vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or receivers or prior trustee or trustees and for the payment of such reasonable administrative expenses and allowances in the prior proceedings as may be fixed by the court appointing such receiver or trustee. . . .

(j) . . . The title of any owner, whether as trustee or otherwise, to rolling-stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this section.

(l) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 643.

BENTLEY W. WARREN and CHARLES W. MULCAHY, as the Trustees of the property of Boston and Providence Railroad Corporation, Debtor,

Petitioners,

—against—

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, as the Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION.

HERMON J. WELLS,
Counsel for Respondents.

FLEMING JAMES, JR.,
Of Counsel.

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IN THE

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OCTOBER TERM, 1939.

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Petitioners,

—against—

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION.

Opinions Below.

The opinion and order of the District Court for the District of Connecticut (R., pp. 251-267) is reported in 26 F. Supp. 18. The opinion of the Circuit Court of Appeals (R., pp. 304-310) is reported in 108 F. (2d) 164, *sub nom. Palmer* v. *Warren*.

Jurisdiction.

The Circuit Court of Appeals' order for mandate was entered on January 8, 1940 (R., pp. 316, 317). The petitioners have invoked the jurisdiction of this

Court under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

Question Presented.

Both the District Court for the District of Connecticut and the Circuit Court of Appeals found jurisdiction from the fact that the former had taken and retained actual physical possession of the property of Boston and Providence Railroad Corporation, lessor,[1] and had operated that property continuously since the commencement of proceedings under Section 77 of the Bankruptcy Act to reorganize The New York, New Haven and Hartford Railroad Company, sublessee, and Old Colony Railroad Company, lessee.[2] Petitioners fail to include this most important fact in the question as they present it to this Court. Their question also omits all reference to the fact that the present controversy involves ascertainment of the amount of the expenses incurred by the trustees appointed by the Connecticut Court in operating and administering Boston and Providence property, and the imposition of a lien therefor on that property. The "question" should have been stated, in substance, as follows:

Did the Connecticut Court, having come into phy-

[1] Petitioners' specification of error No. 3 is inconsistent with the facts in contending that the trustees appointed by the Connecticut Court did not have physical possession of the Boston and Providence property. Those trustees were and still are operating that property.

[2] The three railroad companies will be referred to respectively as "the New Haven", "the Old Colony" and "the Boston and Providence". The District Court for the District of Connecticut will be referred to as "the Connecticut Court". The District Court for the District of Massachusetts, in which proceedings for the reorganization in bankruptcy of Boston and Providence were recently commenced, will be referred to as "the Massachusetts Court".

sical custody of the property of Boston and Providence, lessor, in proceedings under Section 77 of the Bankruptcy Act to reorganize the New Haven, sublessee, and the Old Colony, lessee, have jurisdiction to determine the expenses of its administration and operation of said property and to impose a lien thereon for the amount of said expenses, or was such jurisdiction superseded by the subsequent filing of a petition in the Massachusetts Court for reorganization of the lessor under said Section?

*Statement.**

Before the proceedings for the reorganization of the New Haven began, it, as sublessee of Old Colony, was in actual physical possession of and operating the Boston and Providence property (R., p. 183, fols. 547, 548). After those proceedings started on October 23, 1935, the Boston and Providence property came into the actual possession of respondents as trustees appointed by the Connecticut Court (R., p. 183, fol. 548). They have possessed and operated it ever since as officers of the Court which appointed them, and under that Court's directions. They are doing so now under an order of that Court (R., pp. 208-210) entered July 19, 1938, when the lease was rejected (R., p. 211), and providing in part:

> "5. Pending further order of Court the operation of the property of Boston and Providence for the account of that corporation shall be con-

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* Emphasis should be placed on respondents' possession under orders of the Connecticut and Massachusetts Courts. We do this here without restating the facts set forth in the petition (Rule 27(4)).

> tinued pursuant to subdivision (e)(6) of Sec. 77* of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate."

Indeed, the Massachusetts Court has enjoined any interference with the "present operation" of the railroad or properties of the Boston and Providence (R., p. 228, fol. 683), the petition of its creditor for its reorganization having alleged, and it having by answer admitted, that the property was being operated for its account pursuant to Section 77(e)(6) by respondents as trustees under the foregoing order of the Connecticut Court (R., p. 223, fols. 668, 669; p. 226, fol. 678). And the Massachusetts Court has carefully refrained from interfering in any way with the present proceedings in the custodial court for ascertainment and charge of that Court's expenses of operating and administering the property in the New Haven-Old Colony reorganization proceedings (R., p. 250). At no time has the Boston and Providence—

---

* "Sec. 77(e)(6). If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended."

or any one for it—asked for repossession of its road. The fact of the matter is that respondents have been required to operate it because thus far no one else has been able to do so (R., p. 308, fol. 923).

Argument.

The petition fails to show any reason why the writ should be granted, for:

(1) The decision below, instead of being in conflict with decisions of Circuit Courts of Appeal cited by petitioners, is supported by those decisions.

(a) *Magnolia Petroleum Co.* v. *Thompson*, 106 F. (2d) 217, C. C. A. 8th, 1939, certiorari granted December 4, 1939 (Petition, pp. 7-11).

In the *Magnolia* case the Circuit Court of Appeals stated that the jurisdiction of a court in charge of the reorganization of a railroad under Section 77 to determine a question of title to mineral rights claimed by the railroad depended on whether the railroad's trustee had physical possession of the subsoil. The sole question was whether or not such possession existed. The adverse claimants argued that the deeds to the railroad had granted it a perpetual easement for railroad purposes, limited to the surface and not extending to the subsoil. The court held that as a matter of local law the deeds granted only an easement. The parties stipulated that this limited surface easement did not give the trustees possession of the subsoil, and accordingly the reorganization court did not have jurisdiction to determine subsoil mineral rights.

Thus there is no conflict or possibility of conflict between the two cases on what constitutes possession; and both cases illustrate in striking fashion the familiar rule of law, not disputed by petitioners in the Court below (R., pp. 306, 307, fols. 918, 919), that possession is the basis for bankruptcy jurisdiction. The application of this rule to property in the possession of a bankrupt lessee seems never to have been questioned. *Gazlay* v. *Williams*, 210 U. S. 41 (1908); *Lindeke* v. *Associates Realty Co.*, 146 Fed. 630, C. C. A. 8th (1906); *In re Barnhardt Coal & L. Co.*, 265 Fed. 385, N. D. Ohio (1919); *In re Chambers, Calder & Co.*, 98 Fed. 865, D. R. I. (1900); *In re Kleinhans*, 113 Fed. 107, W. D. N. Y. (1902); *In re Schwartzman*, 167 Fed. 399, D. S. C. (1909); 5 Remington, Bankruptcy (4th Ed. 1936), Sec. 2354; cf. *In re Adams*, 134 Fed. 142, D. Conn. (1905); *Plaut* v. *Gorham Mfg. Co.*, 159 Fed. 754, S. D. N. Y. (1908); *Eldridge* v. *White & Black River V. R. Co.*, 194 Ark. 800, 109 S. W. (2d) 658 (1937).

(b) *Thompson* v. *Terminal Shares, Inc.*, 104 F. (2d) 1, 9, C. C. A. 8th, 1939, certiorari denied, October 9, 1939 (Supplement to Petition).

In that case all of the property in question was in the actual possession of adverse claimants not served in the district. For that reason the Court held it had no jurisdiction over the property, but stated it would have had jurisdiction if the property had been "in the actual or constructive possession of the debtor at the time the petition for reorganization was filed and approved * * *", this being "the traditional jurisdiction" of bankruptcy courts which was continued

by Section 77 (104 F. (2d) at p. 9). Here is concurrence and not conflict.

(c) *General Motors Acceptance Corp.* v. *Horton,* 85 F. (2d) 452, C. C. A. 3d, 1936.

In the *Horton* case the lessor sought, presumably by reclamation petition to the bankruptcy court, "to gain possession of the automobile * * *. from the lessee's trustee in bankruptcy" (85 F. (2d) at p. 453) and the question presented was whether or not it should be returned. The possession of the trustee made the court's jurisdiction so clear that it was not even mentioned. Having jurisdiction, the Court *exercised it* and decided that the property should be returned. The same situation was presented in *In re Lake's Laundry,* 79 F. (2d) 326, C. C. A. 2d, 1935, certiorari denied 296 U. S. 622. Actual possession in the present case is as clear as it was in the *Lake's Laundry* and *Horton* cases. For that reason, jurisdiction is equally clear.

(2) Decisions of this Court have clearly settled the "question" of federal law that petitioners are seeking to present (see "Question Presented", *supra,* pp. 2-3) and Congress has adopted the rule of these decisions into Section 77 of the Bankruptcy Act.

(a) Decisions of this Court.

Where courts would otherwise have concurrent jurisdiction over specific property, the actual possession of it by one of them withdraws the property from the jurisdiction of all others. This principle has been so clearly settled by decisions of this Court that no question with regard to it now exists. It owes its

origin to no statute. It is not peculiar to courts of bankruptcy, but is applicable to all courts, federal and state. *Murphy* v. *John Hofman Co.*, 211 U. S. 562 (1909). It has often been applied in favor of a bankruptcy court. *White* v. *Schloerb*, 178 U. S. 542 (1900); *Isaacs* v. *Hobbs Tie and Timber Co.*, 282 U. S. 734 (1931); and it has also been invoked against a bankruptcy court where jurisdiction over the property has first been obtained by another tribunal. *Straton* v. *New*, 283 U. S. 318 (1931); *Metcalf* v. *Barker*, 187 U. S. 165 (1902); *Pickens* v. *Roy*, 187 U. S. 177 (1902); *Peck* v. *Jenness*, 7 How. 612 (1849). It is applicable also as between a receivership court and another court, *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38 (1908), as well as between receivership courts. See *Harkin* v. *Brundage*, 276 U. S. 36, 43 (1928).

Petitioners, to be sure, suggest that this well-established basis of jurisdiction has been abandoned as to courts proceeding under Section 77, but the suggestion flies in the face of all that has been said or decided on the matter. *Ex parte Baldwin*,* 291 U. S. 610; *Board of Directors of St. Francis Levee District* v. *Kurn*, 91 F. (2d) 118, C. C. A. 8th (1937); *Eldridge* v. *White & Black River V. R. Co.*, 194 Ark. 800. Petitioners' notions are based on language taken out of its context in a note found in Mr. J. W. Moore's

* Petitioners in this connection point to this Court's statement (291 U. S. 610, 615) that: "All property in the possession of a bankrupt of which he claims the ownership, passes upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy." But jurisdiction in that case did not turn upon title. Instead this Court said it turned upon "possession"; and possession gave "exclusive" jurisdiction under Section 77 to "determine all questions" regarding the property though it was outside of the district. Indeed it cited most of the cases cited herein.

1937 edition of Collier on Bankruptcy, which discusses *Continental Ill. National Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648 (1935). The rest of the note discloses the author's meaning to be that Section 77 abandons any *limitation* of jurisdiction to property possessed by the debtor, not that the section abandons possession as a basis of jurisdiction. And certainly no more unlikely inference can be drawn from the *Rock Island* case than that Section 77 has contracted powers already possessed by courts of bankruptcy.

(b) The provisions of Section 77.

Before the reorganization amendments, the Bankruptcy Act itself made no mention of "exclusive jurisdiction". But this Court consistently used these words to describe the power of a bankruptcy court over property in its physical possession. *Hebert* v. *Crawford*, 228 U. S. 204, 208 (1913); *Murphy* v. *John Hofman Co.*, 211 U. S. 562, 569 (1909); *Taylor* v. *Sternberg*, 293 U. S. 470, 472 (1935); *Straton* v. *New*, 283 U. S. 318, 321 (1931); *Isaacs* v. *Hobbs Tie and Timber Co.*, 282 U. S. 734, 737 (1931). The language has never been thought to affect jurisdiction obtained by another court through prior possession of property, except where the bankruptcy power is made paramount. *Straton* v. *New*, *supra*; *Metcalf* v. *Barker*, 187 U. S. 165 (1902); *Peck* v. *Jenness*, 7 How. 612 (1849); *In re Continental Coal Corp.*, 238 Fed. 113, C. C. A. 6th (1916).

Section 77(a) provides in part that:

> "* * * If the petition is so approved, the court in which such order is entered shall, during

> the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located. * * *"

And Section 77(1) states that:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, *shall be the same* as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

In this manner a principle long familiar was adopted unequivocally by Congress. *Ex parte Baldwin*, 291 U. S. 610, 615 (1935); and in adopting it, Congress used familiar words—a fact that is not without significance. *Case* v. *Los Angeles Products Co., Ltd.*, 84 L. Ed. 22, 29 (1939).

In spite of all this petitioners contended below that the jurisdiction vested in the Massachusetts Court by Section 77(a) and by the petition for the reorganization of Boston and Providence automatically overrode the Connecticut Court's custodial jurisdiction over that debtor's railroad. If this contention could ever have raised a substantial question as to the meaning of the statutory phrase, the question has been set at rest by this Court's interpretation of the same words in an analogous statute. *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216 (1936). There it is distinctly held that where a debtor's property is within the possession—and so, within the jurisdic-

tion—of one court, such jurisdiction is not automatically superseded by subsequent proceedings for the reorganization of the debtor (under Section 77B) in another court (unless the first court was engaged in reorganizing or liquidating the same debtor). This is true despite the grant of "exclusive jurisdiction" to the latter court. And by the very terms of Section 77(a) above quoted the Massachusetts Court's jurisdiction over Boston and Providence property is not "exclusive" without qualification, but only for the purposes of reorganizing the Boston and Providence.*

Petitioners argue that an exercise by the Connecticut Court of its jurisdiction in the present case would defeat the reorganization of the Boston and Providence in Massachusetts and be tantamount to its reorganization in Connecticut (Petition, pp. 13-14). A short answer to this argument is to be found in the opinion below (R., pp. 309, 310, fols. 929-930). Moreover in fact and at present the Boston and Providence is being reorganized separately and in its own proceedings before the Commission and the Massachusetts Court.

* Assume by way of analogy that in the ordinary course of carrier operations a freight shipment had come into the hands of respondents in Massachusetts. The Connecticut Court would have jurisdiction to determine claims of the estate against that property for freight charges and to impose a lien therefor even though after the charges had accrued and while the shipment was still in respondents' possession the owner of the shipment went into 77B proceedings in Massachusetts. The "exclusive jurisdiction" of the 77B debtor and its property for the purpose of its reorganization would not automatically oust the Connecticut Court of the jurisdiction resulting from its possession of the shipment—a jurisdiction incidental to the reorganization of another debtor a part of whose estate has been expended on the property in question for the owner's benefit.

CONCLUSION.

Since the decisions on this question are not in conflict and since the question has been settled by this Court, the petition should be denied.

Respectfully submitted.

HERMON J. WELLS,
Counsel for Respondents.

FLEMING JAMES, JR.,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 643.

BENTLEY W. WARREN and CHARLES W. MULCAHY, as the Trustees of the property of Boston and Providence Railroad Corporation,

Petitioners,

—against—

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, as the Trustees of the property of The New York, New Haven and Hartford Railroad Company, and OLD COLONY RAILROAD,

Respondents.

BRIEF FOR RESPONDENTS.

HERMON J. WELLS,
Counsel for Respondents.

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Of Counsel.

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Respondents.

BRIEF FOR RESPONDENTS.

Opinions Below.

The opinion and order of the District Court for the District of Connecticut (R., pp. 251-267) is reported in 26 F. Supp. 18. The opinion of the Circuit Court of Appeals (R., pp. 304-310) is reported in 108 F. (2d) 164, *sub. nom. Palmer* v. *Warren.*

Jurisdiction.

The Circuit Court of Appeals' order for mandate was entered on January 8, 1940 (R., pp. 316, 317). The petition for certiorari was filed January 13, 1940 and was granted March 4, 1940. The jurisdiction of

this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

Question Presented.

The question here is a narrow one, much narrower than petitioners' argument would indicate. The New York, New Haven and Hartford Railroad Company and Old Colony Railroad Company are in a reorganization proceeding under Section 77 of the Bankruptcy Act before the United States District Court for the District of Connecticut. Throughout the proceeding that court, through its trustees, has continued to operate, as a segment of the railroad system in its hands, the line of Boston and Providence Railroad Corporation.[1] This line was long ago leased to the Old Colony, which in turn leased its property to the New Haven. Both leases have been rejected but the Boston and Providence has made no move to reenter and the Connecticut Court has been required under said Section to continue the operation. After rejection of its lease a petition was filed in the Massachusetts Court for reorganization of the Boston and Providence under said Section.

The question is whether the Connecticut Court has jurisdiction to determine the expenses of its custody and operation of the Boston and Providence line and impose a lien thereon for the amount of said expenses.

---

[1] The three railroad companies will be referred to respectively as "the New Haven", "the Old Colony" and "the Boston and Providence". The District Court for the District of Connecticut will be referred to as "the Connecticut Court". The District Court for the District of Massachusetts, in which proceedings for the reorganization in bankruptcy of Boston and Providence were recently commenced, will be referred to as "the Massachusetts Court".

Both the Connecticut Court and the Circuit Court of Appeals found jurisdiction from the fact that the former had taken and retained custody of the physical property of Boston and Providence[2] and had operated that property continuously since the commencement of proceedings under Section 77 of the Bankruptcy Act to reorganize the New Haven and Old Colony. Petitioners slight this controlling fact in the question as they present it to this Court and their statement of the question omits all reference to the fact that the present controversy involves merely the ascertainment of the expenses incurred by the trustees appointed by the Connecticut Court in such custody and operation of Boston and Providence property, and the imposition of a lien therefor on that property. The question is not whether the Connecticut Court may adjudicate a "claim" against the Boston and Providence nor whether the Boston and Providence can be reorganized or its property "administered" for reorganization in the Connecticut Court, despite the ever-recurring contrary implications in the petitioners' brief.

Statement.

Upon approval on October 23, 1935 of the petition of the New Haven for reorganization there came into the custody of the Connecticut Court not only the property owned by the New Haven, but also the property which it had leased in 1893 from the Old Colony, including the property of the Boston and

[2] Petitioners' specification of error No. 3 is inconsistent with the facts in contending that the trustees appointed by the Connecticut Court did not have physical possession of the Boston and Providence property. Those trustees were and still are operating that property.

Providence which the Old Colony had leased from that company in 1888 (R., pp. 36, 69, 183, 252). That property consists of the main line of railroad between Providence and Boston. By its initial order (R., p. 9) the court provided, *inter alia*, for continued operation of the New Haven railroad system and enjoined all interference with all property "belonging to, or in the possession of" the New Haven (R., p. 15). Thereafter, trustees were appointed (R., p. 22) and upon their qualification they took possession of and entered upon the administration and operation of the entire system including the line of the Boston and Providence and several other leased lines.

On June 2, 1936, the New Haven trustees rejected the Old Colony lease (R., p. 29), and the next day the Old Colony petitioned for reorganization in the New Haven proceedings (R., p. 30). This petition was approved (R., p. 44), and the court (R., p. 51) appointed the same persons who were acting as trustees of the property of the New Haven as trustees also of the property of the Old Colony and provided that the latter property should continue to be operated as an integral part of the system by the New Haven trustees, as such (R., p. 53). This property, including the line of the Boston and Providence, has continued to be possessed and operated by the New Haven trustees (R., p. 253), and is so operated now.

The court provided that in case payments were made to comply with the obligations of Old Colony under leases and such leases should be subsequently disaffirmed or rejected by Old Colony or by the Old Colony trustees or under a plan of reorganization

> "the operation of the leased properties shall have been and said payments shall be deemed to have

been made for the account of the lessor, and such payment shall be recovered, set off, or made and charged, on the earnings and properties of the lessor, prior to any mortgage or other lien thereon by such method as the Court shall determine, and further reserving all right and equities of the parties arising from such payments" (Paragraph 9 of Order No. 75, R., pp. 57-59).

No lessor objecting, the court from time to time extended the period for rejection of contracts or leases (R., pp. 318-324, 376).

On May 26, 1937, the Boston and Providence, which from May 1936 had been notified of all happenings in the proceedings (R., pp. 165-167), asked leave to intervene generally (R., pp. 62, *et seq.*) and two days later its petition was granted (R., pp. 90, *et seq.*).

On October 7, 1937, Bankers Trust Company, as Trustee under the New Haven First and Refunding Mortgage, filed its petition for Order No. 217 (R., pp. 92-104) which prayed, *inter alia*, that the court should prevent the further depletion of the assets in the New Haven's estate by directing that further cash payments in connection with the Boston and Providence lease to Old Colony should be discontinued (R., pp. 103-104). An order (R., p. 106), entered by the court upon the same date, provided that if the answer of any party with respect to that petition should challenge or question the segregation of revenues and expenses theretofore prepared by the trustees as constituting a proper basis for the determination of the earnings of the property of the Old Colony or the property of the Boston and Providence, such party should show cause why the issues thus raised should not be referred to the Interstate Commerce Commission "for its recommendation as to the method or formula by which said segregation should

be made, all pursuant to subdivision (c)(10) of Section 77[3] of the Bankruptcy Act as amended" (R., p. 106). On October 21, 1937, the Boston and Providence filed its Answer (R., pp. 362-373) to Petition for Order No. 217 which did so challenge and question the trustees' segregation of revenues and expenses. Other parties to the proceedings did likewise (R., pp. 347, 353, 356, 374). Accordingly the court found that the necessities of the case required a segregation and referred the matter to the Commission for its recommendation (R., pp. 448, 449).

On April 15, 1938, the Interstate Commerce Commission filed with the court its findings and recommendation dated April 9, and on May 25, 1938 these findings and recommendation were confirmed and accepted by the court (R., p. 164).

On April 19, 1938, the New Haven trustees, employing the segregation method recommended by the Commission, filed a report of administration of the property of Old Colony and its leased lines up to and including December 31, 1937 (R., pp. 124-134).

On July 18, 1938, the court entered its Order No. 300 (R., pp. 206, 207) approving said report.[4] The

[3] Sec. 77(c)(10). The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

[4] This order was appealed by special counsel appointed by the Court to represent the Old Colony trustees and substantially affirmed. *Palmer* v. *Palmer*, 104 F. (2d) 161, C. C. A. 2d (1939), certiorari denied October 16, 1939.

next day the court entered Order No. 217 (R., pp. 208-210), directing the Old Colony trustees to reject the Boston and Providence lease, and providing among other things as follows (R., p. 210):

> "5. Pending further order of the Court the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision (c)(6) of Sec. 77[3] of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate.
>
> The Court reserves for further hearing the right to determine the existence and amount of any obligation of Boston and Providence arising out of operation of its property or payments made to it or on its behalf prior to the rejection of its lease, and the liability of the Boston and Providence therefor to the Old Colony estate and by way of subrogation to the New Haven estate."

On the same day (July 19, 1938) the Old Colony trustees did reject the Boston and Providence lease (R., p. 211).

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[3] "Sec. 77(c)(6). If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of Section 1 of the Interstate Commerce Act as amended."

On July 29, 1938, the New Haven and Old Colony trustees filed their petition for Order No. 301 (R., pp. 213-220) wherein they referred to Order No. 300 (R., pp. 206, 207) and to Old Colony trustees' Exhibit 2 introduced at the hearing on the report of administration of Old Colony property which showed the sum charged against Old Colony earnings and property by Order No. 300 covering payments made under the Boston and Providence lease and expenditures incurred in the operation of the property described in that lease during the period from June 4, 1936 to December 31, 1937 (R., pp. 215-216). The petition asked that the court approve the account against the Boston and Providence and order that it constitute a prior lien and charge on the earnings of the Boston and Providence for the benefit of the Old Colony or New Haven trustees and that if recovered by the New Haven trustees, the charge against Old Colony by Order No. 300 should be correspondingly reduced (R., pp. 216, 217).

On August 4, 1938, The Provident Institution for Savings, a creditor of the Boston and Providence holding its entire funded debt, consisting of unsecured debenture bonds, filed a petition for reorganization of the Boston and Providence under Section 77 of the Bankruptcy Act in the District Court of the United States for the District of Massachusetts (R., pp. 221-226). The petition recited that the Boston and Providence lease had been rejected and that the Connecticut Court had ordered that pending its further order, the operation of the property of the Boston and Providence for the account of that company should be continued pursuant to subdivision (c)(6) of Section 77 of the Bankruptcy Act (R., p. 223). On the same day the Boston and Providence filed answer to the petition admitting the material

allegations therein (R., p. 226). The petition was approved by the Massachusetts Court on August 5, 1938 (R., p. 228) which entered its order enjoining and restraining all persons "from interfering in any manner with the present operation of" the railroad or properties of the Boston and Providence "or the carrying on of its business" (R., p. 228),—*viz.*, it enjoined interference with operation of Boston and Providence property by the New Haven trustees under orders of the Connecticut Court (R., p. 240). Consistently, it has not interfered with the proceedings here involved, although requested by petitioners to do so (R., pp. 248-251).

On August 22, 1938, the Massachusetts Court appointed Messrs. Warren and Mulcahy, petitioners here, as trustees of the property of the Boston and Providence and they duly qualified as such on October 18, 1938 (R., p. 3). Pending their qualification, the hearing on Petition for Order No. 301 was several times continued at the request of the Boston and Providence in order that trustees of its property, fully qualified, might have an opportunity to appear (R., pp. 243, 257, 258). When it finally came on for hearing November 14, 1938 the Boston and Providence trustees, though present, declined to appear on record (R., p. 251), and counsel for Boston and Providence pressed a written statement of objections to the jurisdiction of the court to entertain the petition (R., pp. 244-246). By its order dated January 16, 1939 (R., p. 267) the Connecticut Court overruled these jurisdictional objections for the reasons given in its memorandum of decision thereon (R., pp. 251-267). Boston and Providence and its trustees appealed to the Circuit Court of Appeals for the Second Circuit (R., pp. 271-281, 268-270), which unanimously affirmed the judgment

of the District Court on the jurisdictional question (R., pp. 306-310). That is the only question here involved.

The New Haven trustees have been operating the line of the Boston and Providence ever since their qualification and are continuing to do so as officers of the Connecticut Court and under its direction. At no time has the Boston and Providence, or anyone for it, asked for repossession of its road nor contended that such operation should not be continued.

Summary of Argument.

The nub of the case is that the Connecticut Court has jurisdiction so long as the property is in its custody to determine and charge the property with the cost of that custody. To put it graphically: The Connecticut Court which, through its trustees, is actually paying and controlling the men who operate petitioners' railroad, maintain its roadbed, buy and lay new rail to replace that worn out, spend from trust funds the money necessary to operation and preservation of that property, has power to charge the property so preserved and operated. The Connecticut Court, through its trustees, has thus far been required to continue operation of the Boston and Providence property. Petitioners can at any time petition that Court for repossession but they haven't done so, having developed no ability to operate. And the Massachusetts Court has apparently decided to leave the operation with the Connecticut Court.

Petitioners have at last been driven into admissions that the Connecticut Court has "some sort of 'jurisdiction' over the physical property owned by the Boston and Providence" (Brief, p. 11), but seek to

avoid the plain consequences of this admission. They admit, because the cases overwhelmingly so hold, that an owner to reclaim his property must apply to the court in possession and that that court has jurisdiction to order it restored to him. They needed only to add "upon payment or other provision approved by that court of the charges incurred through its interim custody" to have conceded the entire issue. And surely if a court has jurisdiction to order the property returned, it has jurisdiction to condition that return upon payment or other recognition, satisfactory to it, of its expenses for custody and operation. *A fortiori* it has jurisdiction, prior to return or application therefor, to charge the property with those expenses. The latter is all the Connecticut Court did and all this Court is asked to affirm.

Petitioners, it is true, adopt the premise that the power of the Connecticut Court over property in its custody does not include jurisdiction to "administer" the property of Boston and Providence. This statement is sprinkled like pepper throughout their brief. But their use of the word "administer" is ambiguous. If it refers to jurisdiction to reorganize the Boston and Providence, it does not touch the issue here. If it refers to the power of the Connecticut Court to operate the property of the Boston and Providence, it again does not touch the issue here since the property, being a railroad, must be operated and no one has attempted to oppose or prevent such operation. If, however, the word "administer" means the power incidental to custody and operation to charge the property with the expense thereof, that is the issue here and we submit that the Connecticut Court's power extends that far.

The argument to follow may be summarized under four headings:

1. The physical property of the Boston and Providence came lawfully into the possession and custody of the Connecticut Court at the beginning of the New Haven's bankruptcy proceedings and is still being operated by that Court pursuant to requirement of law.

2. This physical possession and custody gave the Connecticut Court jurisdiction *in rem* to determine the amount and priority of the expense incident to its operation and control and to charge the property in its hands with that expense, regardless of the ownership of that property.

3. This jurisdiction was not superseded by the subsequent bankruptcy proceedings of the Boston and Providence.

4. The rules of equity receivership governing administration of railroad properties are applicable under Section 77 and sustain this jurisdiction.

5. Every practical consideration supports this jurisdiction.

Argument.

The Connecticut Court had jurisdiction to ascertain the charges here involved and jurisdiction to impose a lien therefor upon Boston and Providence property.

I. The physical property of the Boston and Providence came lawfully into the possession and custody of the Connecticut Court at the beginning of the New Haven's bankruptcy proceedings and is still being operated by that Court pursuant to requirement of law.

Before the proceedings began the New Haven, as sublessee of Old Colony, was in actual possession of

the Boston and Providence property. As detailed above, after approval of the New Haven's petition under Section 77, the Boston and Providence property came into the actual physical possession of trustees appointed by the Connecticut court. They have possessed and operated it ever since as officers of the court which appointed them, and under that court's directions. They are doing so now "pursuant to subdivision (c)(6) of Sec. 77", as provided by an order of that Court entered July 19, 1938, the day the lease was rejected (R., pp. 208-211). On August 4, 1938 a creditor petitioned that the Boston and Providence be reorganized under Section 77 in the District of Massachusetts, and the Massachusetts court in approving the petition enjoined any interference with the "*present operation*" of the railroad or properties of the Boston and Providence (R., p. 228). At no time has that company—or any one for it—asked for repossession of its road.[6] The fact of the matter is that respondents have continued to operate it because thus far petitioners have neither asked nor been able to do so.

Thus the Connecticut court, through its officers,

[6] Petitioners advance the suggestion that Section 77(c)(6) is inapplicable because the lessor upon rejection filed no petition for a decree that it would be impracticable and contrary to the public interest for the lessor to operate its line. But the District Court found the lessor, a general intervenor, "wholly without any operating organization" (R., fol. 629) and accordingly held that the Court must continue its custody "pursuant to the provisions of (c) (6) of Section 77" because that subsection left the property in its hands until either (1) the lessor retook it or (2) abandonment was authorized by the Commission. Moreover, the Boston and Providence, having failed to develop ability to operate, admitted in its answer to its creditors' petition that the Connecticut Court had ordered operation of its property by the New Haven trustees for its account pursuant to Section 77(c)(6) and the Massachusetts Court thereupon enjoined interference with such operation (R., pp. 221-228).

assumed actual control and possession of the Boston and Providence's physical property at the very threshhold of these proceedings. Nor was this assumption of control and possession unwarranted.[7] True the leased property was not "owned" by the debtor. But the bankruptcy court's authority to take custody of property has never been limited to property owned by the debtor. It extends as well to all property possessed by the debtor in which he has or is claimed to have some interest which may benefit the estate. This power is nowhere expressly granted by the bankruptcy act; custody is taken simply as an incident to the estate's administration. Times almost without number courts have entered into possession of premises held by the debtor as tenant, both in cases of ordinary bankruptcy, *Gazlay* v. *Williams*, 210 U. S. 41 (1908); *Page* v. *Arkansas Nat. Gas Corp.*, 53 F. (2d) 27, C. C. A. 8th, 1931; *In re Chambers, Calder & Co.*, 98 Fed. 865, D. R. I. 1900; *In re Kleinhans*, 113 Fed. 107, W. D. N. Y. 1902; *In re Schwartzman*, 167 Fed. 399, D. S. C. 1909; *Plaut* v. *Gorham Mfg. Co.*, 159 Fed. 754, S. D. N. Y. 1908; *In re Manhattan Piggly-Wiggly Co.*, 296 Fed. 944, S. D. N. Y. 1923, and in cases arising under the reorganization amendments. *In re Chase Commissary Corp.*, 11 F. Supp. 288, S. D. N. Y. 1935; *In re Penn Victor Dairies, Inc.*, 12 F. Supp. 126, E. D. Pa. 1935; *Eldridge* v. *White & Black River V. R. Co.*, 194 Ark. 800, 109 S. W. (2d) 658 (1937); *cf. Penn. Steel Corp.* v. *New York City Ry. Co.*, 198

[7] Perhaps the court's mere taking of possession, though unwarranted, would give the jurisdiction claimed; but it is not necessary in this case to argue the point.

See *Crawford* v. *Hebert*, 228 U. S. 204, 208 (1913); *In re Tax Service Ass'n. of Illinois*, 305 U. S. 160, 164 (1938); *Story & Clark Piano Co.* v. *Holmes*, 251 Fed. 565, 566, C. C. A. 7th 1918, for broad language.

Fed. 721, 728, 729, C. C. A. 2d, 1912 (equity receivership).

It is true that the leased premises were not within the District of Connecticut. But the authority of the bankruptcy court to take custody of property held by or for the debtor is not limited by state lines even under the provisions of the original Act of 1898. *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734 (1931); *Board of Road Comm'rs.* v. *Keil*, 259 Fed. 76, C. C. A. 6th, 1919; *Galbraith* v. *Robson-Hilliard Grocery Co.*, 216 Fed. 842, C. C. A. 8th, 1914; *Thomas* v. *Woods*, 173 Fed. 585, C. C. A. 8th, 1909; *In re Granite City Bank*, 137 Fed. 818, C. C. A. 8th, 1905. The authority of a court proceeding under Section 77 is—to say the least—not more limited. *Ex parte Baldwin*, 291 U. S. 610 (1934); *cf. Continental Ill. Nat. Bank* v. *Chicago R. I. & P. Ry. Co.*, 294 U. S. 648, 681-684 (1935). Compare also *Palmer* v. *Palmer*, 104 F. (2d) 161, C. C. A. 2d, 1939, in which the propriety of possession in a like case[8]—though not challenged—was assumed by the court. Express provisions of Section 77 for segregation of earnings and expenses between parts of the railroad separately subject to mortgage or lease[9] and for continued operation of leased lines after rejection[10] make it clear that the bankruptcy court is empowered to take possession of the whole system including leased properties. This course has been followed in other reorganizations and

[8] We refer to the period before the Old Colony became a debtor in these proceedings. Though the Old Colony was then potentially eligible for reorganization in the Connecticut court—as well as in Massachusetts—this would seem to have no bearing on the propriety or fact of the former court's possession, at *that* time, of premises leased to the New Haven.

[9] Subdivision (c) (10) quoted in note 3, page 6.

[10] Subdivision (c) (6) quoted in note 5, page 7.

has received judicial recognition. *Eldridge* v. *White & Black R. V. R. Co., supra,* 194 Ark. 800. Indeed, in the case at bar Boston and Providence interests do not seem to challenge the fact or the propriety of the Connecticut court's custody of its property, but rather to deny the consequences of this custody.

II. This physical possession and custody gave the Connecticut Court jurisdiction to determine the amount and priority of the expense incident to its operation and control and to charge the property in its hands with that expense, regardless of the ownership of that property.

Physical possession and custody of the Boston and Providence property gives the Connecticut Court the jurisdiction here exercised to determine the amount and priority of the charge incident thereto.[11]

Where courts would otherwise have concurrent jurisdiction over specific property, the actual possession of it by one of them withdraws the property from the jurisdiction of all others. This principle is not peculiar to courts of bankruptcy but is applicable to all courts, federal or state. *Murphy* v. *John Hofman Co.*, 211 U. S. 562 (1909). It has often been applied in favor of a bankruptcy court, *White* v. *Schloerb*, 178 U. S. 542 (1900); *Isaacs* v. *Hobbs Tie & Timber Co., supra*, 282 U. S. 734 (1931); and it

[11] Petitioners suggest that the reversionary interest of the Boston and Providence was not in possession of the Connecticut Court. As was stated by the Circuit Court below "this misconceives the nature of the doctrine, which depends merely upon possession in the natural sense that the court's officers are in control of the property *de facto* and can exclude all others * * *. Moreover we can attach no meaning whatever to the 'possession' of a legal interest in a thing, except as it means the thing as an object of nature" (R., p. 307). The Connecticut Court, through its officers, has been at all times here material and is now actually operating the Boston and Providence railroad.

has also been invoked against a bankruptcy court where jurisdiction over the property has first been obtained by another tribunal. *Straton* v. *New*, 283 U. S. 318 (1931); *Metcalf* v. *Barker*, 187 U. S. 165 (1902); *Pickens* v. *Roy*, 187 U. S. 177 (1902); *Peck* v. *Jenness*, 7 How. 612 (1849). It is applicable also as between a receivership court and another court, *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38 (1908), as well as between receivership courts. See *Harkin* v. *Brundage*, 276 U. S. 36, 43 (1928). The jurisdiction obtained through possession by a court proceeding under Section 77 is exclusive in like manner. *Ex parte Baldwin, supra*, 291 U. S. 610 (1934) (where the property was out of the district); *Board of Directors of St. Francis Levee District* v. *Kurn*, 91 F. (2d) 118, C. C. A. 8th, 1937. It remains to consider the nature and extent of this jurisdiction with reference to the facts of the case in hand.

A. This jurisdiction is in rem.

In the first place the jurisdiction of a court to determine questions concerning specific property in its custody is *in rem* and does not depend on obtaining personal service on parties whose interests will be affected by the determinations. *Thomas* v. *Woods, supra*, 173 Fed. 585, C. C. A. 8th, 1909; *In re Granite City Bank, supra*, 137 Fed. 818, C. C. A. 8th, 1905.[12] Sometimes these determinations require the aid of another court's process to make them fully effective—as where an *in personam* order or a judgment *in personam* is sought. Yet even in that situation the power to adjudicate rights *in the property* resides in the bankruptcy court. *Staunton* v. *Wooden*, 179 Fed. 61, C. C. A. 9th, 1910; *cf. In re Wood and Henderson*, 210 U. S. 246

[12] In both these cases the property was outside the district in which the bankruptcy court sat.

(1908). In the present instance the Connecticut Court assumed only to make an adjudication of this kind (R., pp. 265-266), though perhaps it would have been justified in going farther. *Cf. Ex parte Baldwin, supra,* 291 U. S. 610; *Continental Ill. Nat. Bank* v. *Chicago R. I. & P. R. Co., supra,* 294 U. S. 648.

B. This jurisdiction rests on physical possession, not on ownership by the debtors.

A second consideration is more important here. The jurisdiction under discussion has its roots in physical possession and does not at all depend on whether, under the substantive law, some third party may be entitled to possession. This does not mean that third parties are deprived of their substantive rights. But it does mean that they must pursue them in the court which has custody of the property. Thus if one asserts ownership and right to possesion of a chattel held by a bankruptcy court, his remedy is a petition for reclamation addressed to that court. *Kellogg-Mackey-Cameron Co.* v. *Curtice,* 162 Mo. App. 124, 144 S. W. 152; Gilbert's Collier on Bankruptcy (4th ed. 1937) 1247; 5 Remington, Bankruptcy (4th ed. 1936), Sec. 2450. He may not invoke the process of any other court although that process would be appropriate enough under ordinary circumstances, *White* v. *Schloerb, supra,* 178 U. S. 542 (1900); *Murphy* v. *John Hofman Co., supra,* 211 U. S. 562 (1909). He may not even seek an adjudication of his substantive rights—at least if they are disputed on behalf of the estate—in any other tribunal. *Ex parte Baldwin, supra,* 291 U. S. 610, 615 (1934).[13]

[13] He may test his claim in another court, if the bankruptcy court gives him leave to do so. The fact that under some peculiar circumstances such leave ought not to be withheld (*Texas* v. *Donoghue,* 302 U. S. 284, 1937) does not, we urge, impair the general principle or affect its application to the present case.

And the bankruptcy court in possession has jurisdiction to determine his claim though in doing so it decide that the debtor—and consequently the estate—had no beneficial interest in the property whatever. *In re Tax Service Ass'n of Illinois, supra,* 305 U. S. 160 (1938).

Similar principles prevail where a court of bankruptcy holds leased premises. A state court will decline to entertain a suit which concerns their title or possession. *Eldridge* v. *White & Black R. V. R. Co., supra,* 194 Ark. 800, 109 S. W. (2d) 658 (1937) (under Sec. 77). If the lessor elects to declare a forfeiture of the lease, the proper remedy is an application to the bankruptcy court. *Gazlay* v. *Williams, supra,* 210 U. S. 41 (1908) (forfeiture denied); *Lindeke* v. *Associates Realty Co.,* 146 Fed. 630, C. C. A. 8th, 1906 (forfeiture enforced); *In re Barnhardt Coal & L. Co.,* 265 Fed. 385, N. D. Ohio, 1919 (forfeiture denied); see *In re Manhattan Piggly-Wiggly Corp., supra,* 296 Fed. 944, S. D. N. Y. 1923. Even where the trustee has renounced the lease and become, in effect, a trespasser, redress against him is to be sought in the bankruptcy court, *Green* v. *Finnigan Realty Co.,* 70 F. (2d) 465, C. C. A. 5th, 1934; *cf. In re Chase Commissary Corp.,* 13 F. Supp. 83, S. D. N. Y. 1935. For the nature of that court's jurisdiction is such that the landlord's attempts to gain possession through any other court will be enjoined, *In re Chambers, Calder & Co., supra,* 98 Fed. 865, D. R. I. 1900; *In re Kleinhans, supra,* 113 Fed. 107, W. D. N. Y. 1902; *In re Schwartzman, supra,* 167 Fed. 399, D. S. C. 1909;[14] 5 Remington, Bankruptcy (4th ed. 1936), Sec. 2354; *cf. In re Adams,* 134 Fed. 142, D.

[14] In all these cases the landlord's right to the property—under the substantive law of landlord and tenant—was clear.

Conn. 1905; *Plaut* v. *Gorham Mfg. Co., supra,* 159 Fed. 754, S. D. N. Y. 1908; unless, indeed, the other court was the first to obtain jurisdiction over the property. *In re Van Da Grift Motor Car Co.,* 192 Fed. 1015, W. D. Ky. 1912; *cf. In re St. Louis & Kansas Gas & Oil Co.,* 168 Fed. 934, D. Kan. 1908. In the present case the Connecticut court's possession was initially lawful. Even, therefore, if it were contended —which it is not—that its possession has now become trespassory, such a contention should be presented to the Connecticut court which would have jurisdiction to determine it.

Petitioners, to be sure, suggest that this well established basis of jurisdiction has been abandoned under Sec. 77 in favor of "title", but this suggestion flies in the face of all that has been said or decided in the matter. Petitioners' notion is based on language taken out of its context in a note found on page 1467 of Mr. J. W. Moore's 1937 edition of Collier on Bankruptcy. The note discusses the *Rock Island* case, the power of the reorganization court to stay the enforcement of liens, and the effect of Section 77 as "*widening* the scope of the court's jurisdiction to *include* property not in the actual or constructive possession of the debtor." In the course of his analysis Mr. Moore says that the section thus "shifts from the former bankruptcy notions of possession to that of title in determining the court's jurisdiction over the debtor's property and its consequential power to control it." From the whole discussion it is clear he means that the section abandons any *limitation* of jurisdiction to property possessed by the debtor, not that the section abandons possession as a basis of jurisdiction. No more unlikely inference could be drawn from the *Rock Island* case than that Section 77

had contracted powers already possessed by courts of bankruptcy. The section explicitly grants the reorganization court the same jurisdiction it would have had in ordinary bankruptcy (Section 77(l)) and this would surely include the jurisdiction incidental to custody which all courts possess. *Thompson* v. *Terminal Shares*, 104 F. (2d) 1, 8, 9, C. C. A. 8th, 1939, certiorari denied October 9, 1939 states, page 9, that the "traditional jurisdiction" of bankruptcy courts applies to Section 77. A state court has so held in declining to take jurisdiction over premises in the possession of a lessee's trustees. *Eldridge* v. *White & Black R. V. R. Co., supra,* 194 Ark. 800, 109 S. W. (2d) 658 (1937) (under Section 77). And the federal courts have so assumed in practice. Thus, applications for reclamation and repossession of leased premises under Sec. 77B are still addressed to the bankruptcy court and dealt with by it. *In re Lake's Laundry,* 79 F. (2d) 326, C. C. A. 2nd, 1935 (reclamation); *In re Ideal Laundry,* 10 F. Supp. 719, N. D. Cal. 1935 (reclamation); *In re Chase Commissary Corp., supra,* 11 F. Supp. 288, S. D. N. Y. 1935 (repossessions of leasehold); *In re Penn. Victor Dairies, supra,* 12 F. Supp. 126, E. D. Pa. 1935 (repossession of leasehold).[13]

C. This jurisdiction includes power to charge the property in a court's custody with expenses, resulting from that custody, which were paid out of the estate being administered by the court.

The Connecticut court in this case seeks simply to charge the Boston and Providence Railroad property with the amount spent on it out of the New Haven-Old Colony estates during the period of administration. This much a court clearly has power to do to

[13] Although cases arose under Section 77B, there seems to be no difference between the two so far as the present question goes.

property in its physical possession. It may say in effect: *no one* can have this property unless and until he has paid my officers what they have spent on it.[16] Thus in cases where property in the hands of the bankruptcy court is reclaimed, the court may condition its surrender upon the payment of expenses incurred in keeping the property.[17] 5 Remington, Bankruptcy (4th ed. 1936) Sec. 2470. Such charges were imposed by the order in *In re John H. Parker Co.*, 268 Fed. 868, N. D. Ohio, 1920 the court saying,

> "An order will be made directing the materials to be delivered to the Flooring Company upon the payment by it of storage charges. These latter charges were necessary for the preservation of this property prior to the filing of the Flooring Company's reclamation petition and pending [its] determination. * * *. They were expenditures really made for the benefit of the Flooring Company and should be paid by it" (p. 869).

A similar case is *In re J. C. Wilson & Co.*, 252 Fed. 631, S. D. N. Y. 1917. There a bankrupt stockholder's customers were held entitled to reclaim certain securities (or their traceable proceeds) which had been converted. The commissions of the trustee and his attorney were imposed on the general estate (exclusive of the reclaimed property). But, the court reasoned, the trustee had had to engage accountants to unravel the books and trace the stock. And while the trustee represented general creditors, the expense

[16] From this would follow the *power* to disturb existing liens in the property, whatever the *propriety* of doing so.

[17] We are not, of course, directly concerned under the present head with the propriety of such a charge. Yet decisions which impose it, impliedly uphold the power to make it and they must be resorted to since the jurisdiction seems never to have been called into question.

incurred under this head "was for the benefit of the claimants, and work which it would have been necessary for them to have done, if this arrangement had not been made. These disbursements * * * were therefore chargeable to each claimant * * *" (p. 657).

In like manner courts have assumed the power to set conditions upon the surrender of rented property for, " * * * the jurisdiction of bankruptcy court having attached to the exclusion of the jurisdiction at law, the right of the landlord can be enforced only upon equitable terms." *In re Chambers, Calder & Co., supra,* 98 Fed. 865, (wherein the court decided that it alone had the power to decide whether the rights of all parties required that the receiver's possession be continued for a time and, if so, to determine what would be reasonable compensation to the landlord for the delay). Similar notions were applied in a reclamation case where the effective date of the order of surrender was postponed for 60 days to permit the filing and consideration of a plan of reorganization, though the trustee asserted no claim of ownership to the property. *In re Ideal Laundry, supra,* 10 F. Supp, 719, N. D. Cal., 1935.

These cases treat surrender of the property and conditions placed on surrender. In the present case the Connecticut court seeks to impose a lien when surrender is not wanted. But no distinction favorable to Boston and Providence's position can be spun out of this difference. In each situation the court exercises dominion over the property in such a way that those interested in it may redeem it only by complying with the court's conditions; in each there is in effect a lien. In each case, too, the conditions imposed arise directly out of the court's possession or

directly concern the purpose for which the possession was taken. So far as any question of power goes it is submitted that a court may govern the continuance of its custody equally as well as its relinquishment of custody.

A court's jurisdiction over property in its custody is often described in the most sweeping terms as including the exclusive power to determine all questions of title, possession, and control. See, for example, *Murphy* v. *John Hofman Co., supra,* 211 U. S. 562 at 569; *Ex parte Baldwin, supra,* 291 U. S. 610 at 615. Yet perhaps the jurisdiction—at least in its exclusive aspect—is no broader than it need be to protect the possession and the purposes for which possession has been taken. *Cf. Brown* v. *Crawford,* 254 Fed. 146, D. Ore. 1918; *Knudsen* v. *First Tr. & Sav. Bank,* 245 Fed. 81, C. C. A. 9th, 1917; *Mercantile Tr. Co.* v. *Lamoille V. R. Co.,* 17 F. Cas. No. 9432, C. C., D. Vt. 1879. However that may be, no possible limitation on that score concerns the present case. It does not matter whether the court's power extends beyond the limits within which it has been exercised. Petitioners urge that the Connecticut court would be powerless to "administer" their railroad property as an asset of the New Haven-Old Colony estates. It is idle to inquire whether an attempt to do this would be beyond the court's power or merely an erroneous exercise of that power, for the attempt is not being made. Here the court has sought to charge the property only with the cost incurred in possessing it and only to the extent necessary to prevent the diversion of the funds of the estates it is administering. Solely as an incident to this objective is there any dealing "with the lessor's interest in the lessee's bankruptcy." This does not amount to administering the property as an

asset of the estates any more than the enforcement of a bankrupt carrier's lien against a piano transported by the trustee amounts to administering the piano as a part of the estate (*cf.* illustration, p. 36, *infra*). Failure to recognize this fact is a weakness that underlies petitioners' whole argument.[17a]

Petitioners, it is true, urge that the power of a bankruptcy court over property in its custody is limited to (1) determining whether the property is that of the bankrupt and subject to administration as his estate, and (2) administering upon the bankrupt's property. But this is an obvious oversimplification, and by no means follows necessarily from adopting the premise that a bankruptcy court lacks jurisdiction to "*administer*" upon other property than the bankrupt's. Surely the power which flows from custody is broad enough to cover the various purposes and results which custody may involve. If possession entails no expense and exists only for the purpose of determining whether the bankrupt owned the goods,[18] what petitioners urge may be true enough, though even here the court would seem to have the power to make a wrong as well as a right decision on the merits. But possession may be taken or continued for other purposes—as it generally is by a bankrupt

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[17a] Petitioners stray from the record in a footnote on page 41 of their brief to impress this Court with the possible size of the lien. This, of course, is not the issue here.

[18] In cases like this the jurisdiction of the bankruptcy court is sometimes said to extend to property in the bankrupt's possession under a claim of ownership. The language suffices for the purpose at hand, viz., to emphasize the point that jurisdiction depends on the *claim*, not the *fact* of ownership. But, we submit, the language was never meant to limit jurisdiction to cases involving the bankrupt's *ownership*. This appears from all the instances where the bankruptcy court assumed to deal with property which the bankrupt did not claim to own, *e. g.*, the lease cases cited on pages 14 and 15, *supra*; *In re Ideal Laundry*, 10 F. Supp. 719, N. D. Calif., 1935.

lessee's trustee, or as it is under Section 77(c)(6) or otherwise under a public duty to operate—and such possession may involve expense to the estate. Where it does, we submit, the bankruptcy court's jurisdiction is not so circumscribed as petitioners suggest.

The illustration offered on pages 20-21 of petitioners' brief misses the point of our argument. We do not contend that a hypothetical foreclosure or attachment suit brought against the Boston and Providence property in another court during the present proceedings could be enjoined by the Connecticut court. But we *do* contend that if the attaching creditor or mortgagee or his receiver sought possession of the property, this could be done only by application to the Connecticut court which would have jurisdiction to order the surrender and set the terms upon which it might be had. And we *do* contend that if the parties are satisfied to leave the property in the Connecticut court's custody they cannot successfully challenge the Connecticut court's power to impose on the property a lien for the expenses of that custody.

III. The jurisdiction of a bankruptcy court over premises of which the bankrupt was possessed as lessee is not superseded by the subsequent bankruptcy of the lessor (under Section 77, or otherwise).

A. In general.

The next question is whether the jurisdiction of the Connecticut court over the property in its physical possession was superseded—so far as the leased premises were concerned—by the later proceedings to reorganize the lessor under Section 77 in the District of Massachusetts. These proceedings could have that effect only if the court administering them had for some reason a jurisdiction paramount to that of the Connecticut court, which was first in possession.

Buck v. *Colbath*, 3 Wall. 334, 341 (1865); *Gross* v. *Irving Trust Co.*, 289 U. S. 342 (1933). Concededly Congress may make proceedings in bankruptcy superior to any other proceedings which might interfere with the objectives legitimately to be sought by a system of bankruptcy. *Gross* v. *Irving Trust Co., supra*, 289 U. S. 342. Doubtless it may also prefer one bankruptcy court over another. Section 32. It remains to consider whether it has done so in a case like the present. Reference must be had, of course, to the applicable provisions of the statute.

B. The provisions of the Bankruptcy Act.

(1) *Section 32.*[19] This section provides for the situation where more than one bankruptcy proceeding is brought *against a single debtor.* See also General Order VI. But it furnishes no formula for resolving jurisdictional conflicts arising in any other way. Where it does not apply, priority in time of possession is used as the test between two bankruptcy courts, just as between any others. *In re Continental Coal Corp.*, 238 Fed. 113, C. C. A. 6th, 1916; *cf. In re Waxelbaum*, 98 Fed. 589, S. D. N. Y. 1899. Specific venue provisions under the reorganization acts are also obviously inapplicable here.

(2) *The four months' rule.* Under Section 67f. of the Act all levies, judgments, attachments, or other liens "obtained through legal proceedings" against

[19] "In the event petitions are filed against the same person, • • • in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest." As amended effective in September 1938 the transfer is made "by order of the court first acquiring jurisdiction".

an insolvent within four months of bankruptcy, are annulled. Narrowly stated, the question is whether a lien obtained in a bankruptcy proceeding is obtained "through legal proceedings" within the meaning of the section. No court has ever made such an application of this section and apparently it has never even been suggested, although courts have construed the words "legal proceedings" to include equity receiverships and creditors suits, as well as actions at law. *Gross v. Irving Trust Co., supra,* 289 U. S. 342 (1933); see cases collected in 11 U. S. C. A., Section 107 note 173. *In re Continental Coal Corp., supra,* 238 Fed. 113, decides inferentially that the words do not include proceedings in bankruptcy, for the first bankruptcy court to obtain jurisdiction was held entitled to retain it, though adjudication in the second court followed within a few days. Section 67 was not even mentioned, though if the first suit had been an equity receivership that section would have applied.

If the matter is regarded more broadly, it becomes apparent that Section 67 was never intended to make one bankruptcy proceeding paramount to another. Surely the congressional objectives are no more to be served by the later than the earlier bankruptcy. Nor has the federal legislature any interest in preferring one bankrupt over another. If each bankruptcy proceeding superseded jurisdiction obtained in earlier bankruptcies—where there was any conflict—unutterable confusion would result, and no observable purpose would be served.[20] It is significant that during the forty years the act has been in force such a result has never even been suggested.

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[20] See comments of the District Court at R., page 263, folio 789, for illustration.

As now amended Section 67 invalidates liens "obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition in bankruptcy or of an original petition under * * *" the Chandler Act. The amendment did not go into effect until September 22, 1938—over a month after the filing of Boston and Providence's petition in the Massachusetts court. But the Act was made applicable to pending bankruptcy proceedings, and it could be urged that any of its provisions which might avoid the Connecticut court's right to hold property in its possession came into play when the amendment took effect. There are, however, no such provisions. In defining the kind of liens which are superseded the new language corresponds exactly with the judicial construction of the old. There is no suggestion that the amendment of this section was designed to make bankruptcy proceedings evoke property from jurisdiction already acquired over it by another court of bankruptcy. Indeed the reverse is true. The Chandler Act sets up new machinery for liquidation (in Chapters 10, 11, 12 and 13) which was thought preferable in some cases to liquidation in ordinary bankruptcy. But the statute clearly contemplates that the former shall supersede the latter only if a certain prescribed procedure is followed; viz., the filing of a petition under the appropriate chapter of the Chandler Act, *in the pending bankruptcy proceeding.* 11 U. S. C. A. Secs. 527, 721, 821, 1021. There could scarcely be a better indication that the peremptory and rough-shod operation of Section 67 was never intended to govern relationships between courts of bankruptcy.

C. The provisions of Section 77.

(1) *Section 77(a)* vests the bankruptcy court with "exclusive jurisdiction of the debtor and its property wherever located" "during the pendency of proceedings under this section and for the purposes thereof". This provision, we submit, was never intended to bear on a case like the present.

There is nothing new about the "exclusiveness" of bankruptcy jurisdiction. *In re Greyling Realty Corp.*, 74 F. (2d) 734, 736, C. C. A. 2d, 1935. It is a word used time and again with reference to jurisdiction under the old act. *Taylor* v. *Sternberg*, 293 U. S. 470, 472 (1935); *Straton* v. *New*, *supra*, 283 U. S. 318, 321 (1931); *Isaacs* v. *Hobbs Tie & Timber Co.*, *supra*, 282 U. S. 734, 737 (1931). But the concept has ever yielded to the jurisdiction obtained by another court through prior possession of property, except where the bankruptcy power was made paramount. *Straton* v. *New*, *supra*, 283 U. S. 318; *Metcalf* v. *Barker*, *supra*, 187 U. S. 165 (1902); *Peck* v. *Jenness*, *supra*, 7 How. 612 (1849); *In re Continental Coal Corp.*, *supra*, 238 Fed. 113, C. C. A. 6th, 1916. Section 77, we contend, does not make these precedents inapposite. See *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, 222 (1936). As this Court has recently just said of certain phrases in Section 77B: "where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary." *Thomas K. Case et al.* v. *Los Angeles Lumber Products Company Ltd.*, 84 L. Ed. 22, 29 (1939). The phrase "exclusive jurisdiction of the [debtor's] property wherever located" is well adapted to vest in reorganization courts the territorial latitude and the

ability to override other types of proceedings already accorded to bankruptcy but theretofore withheld from equity reorganizations. This was a principal object of the legislation. See *Continental Ill. Nat. Bank v. Chicago, R. I. & P. Ry. Co., supra*; 294 U. S. 648, 683 (1935); Finletter, Corporate Reorganization (1939), 115 *et seq.* The language will have an office if it fulfills this aim. There is no need to explain it as implying a Congressional preference for jurisdiction gained in one reorganization proceeding over jurisdiction previously gained in another.

A narrower argument which supports respondents' position deserves attention. By the very terms of the statute the Massachusetts court's jurisdiction over Boston and Providence property is not "exclusive" without qualification, but only "for the purposes" of reorganizing the Boston and Providence.[20a] It does not therefore exclude jurisdiction of another court over that property for any other purpose (*e. g.*, as incidental to actual custody and operation of Boston and Providence property), unless somewhere else in the act that other purpose is subordinated to reorganization in bankruptcy so that it may not stand.

Other parts of the act point to the construction we urge as to Section 77(a). Section 77(j) empowers

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[20a] The petitioners argue at page 41 that if the Connecticut Court has jurisdiction to determine the amount and priority of the lien on the property of the Boston and Providence in its custody, "then the Massachusetts Court has only a perfunctory jurisdiction over 'the new allocation of interests in' the Boston and Providence property." Here again they drift from the issue. The Connecticut Court has exercised a jurisdiction which is *solely* incidental to its custody, a custody the Massachusetts Court is not ready to assume. It has made no attempt to reorganize the Boston and Providence nor to interfere with the Massachusetts Court's supervision of the preparation and effectuation of a plan for that company. Whether or not this turns out to be "perfunctory" is not the issue here.

the reorganization court to enjoin or stay the enforcement by judicial proceedings of any lien upon the estate. If, now, Section 77(a) automatically divested every other court of jurisdiction over the debtor's property—however it may have been acquired—then the provisions of subdivision (j) would appear to be superfluous, for they clearly contemplate the stay of proceedings having some validity. Were they intended as an additional remedy against court action which had been wholly nullified, the stay would hardly have been made discretionary. Cases denying the stay impliedly recognize the prior court's authority as something not already supplanted by the approval of the reorganization petition. *In re Mural Holding Corp.*, 75 F. (2d) 941, C. C. A. 2d, 1935.

The interpretation of Section 77B(i) [analogous to 77(i)] declared in the *Duparquet* case is quite inconsistent with an interpretation of Section 77(a) which would make reorganization proceedings automatically override a prior jurisdiction over the debtor's property where an adjudication in ordinary bankruptcy would not have had that effect (see pp. 222, 223). Indeed the court cites Section 77B(a) to show the statute does not do this (p. 223).[21] Of course the *Duparquet* case does not deal with a conflict between reorganization courts. But once let it be conceded that the language of Section 77(a) does not of its own force strike down the jurisdiction of other courts over the debtor's property in all conceivable circumstances, and we are driven to the rest of the act and its history to seek that exception to the general rules of comity which petitioners need to support their position here.

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[21] *Union & New H. Tr. Co. v. Taft Realty Co.*, 123 Conn. 9 (1937) is in accord with this analysis.

(2) *Section 77(i).* Under this subdivision a trustee appointed for a debtor under Section 77 is "entitled forthwith to possession of and [is] vested with title to" property in the hands of "a receiver or trustee" who has been appointed "of all or any part of the property of such [debtor] by a Federal or State court". The question is whether this provision applies to property of the debtor which is lawfully in the possession of trustees appointed by another reorganization court in administering the estate of another debtor.

The provisions of Section 77(i) are practically identical with those of Section 77B(i).

The purpose of the latter sub-section and its interpretation have been recently examined and decided by this Court. *Duparquet, Huot & Moneuse Co. v. Evans, supra,* 297 U. S. 216. The provision was declared inapplicable to a state receivership which was incidental to a mortgage foreclosure suit, though strictly speaking such a receivership is equitable and comes within the literal terms of the act. The court reasoned that the statute came in response to a dissatisfaction with the shortcomings of a system offering only liquidation in bankruptcy and reorganization in equity. These were the remedies "to be supplanted or more efficiently controlled" (p. 219) not receiverships to collect rents and profits in foreclosure actions. So Section 77B(i) is confined in its operation to state or federal proceedings of which "The end was reorganization or liquidation or something akin thereto" (p. 220). Other proceedings and suits which were not intended to liquidate or reorganize the debtor, were unaffected by this subsection though they might effectually result in taking away all the debtor's assets (as they would in the *Duparquet* case).

From this case it clearly appears that Section 77B(i) is aimed at the supersession of any other suit or proceeding *for the liquidation or reorganization of the debtor in question.* As to this debtor, the end of the statute—reorganization—was deemed paramount to the liquidation in ordinary bankruptcy, and the means were deemed superior to the means in equity. But the section discloses no intention whatever to prefer the reorganization of one corporation to the reorganization of another different corporation. It seeks simply to assure that the liquidation of a debtor will be effected under Section 77B (rather than ordinary bankruptcy or receivership) if either the debtor or his creditors desire it. Any possible conflict between the reorganization court and other courts which are not seeking to reorganize or liquidate the debtor's estate but which have run afoul of his property, are left to be handled under Section 77B(c) (10) or its counterpart Section 77(j). After all, Section 77(j) applies only to a trustee or receiver appointed "of * * * the property of a debtor * * *" who is later brought into Section 77 proceedings. It does not apply to the receiver or trustee of anyone else's property even though that other person may happen to be a "debtor" in some independent proceedings, and even though that trustee may happen to have lawful possession of the first mentioned debtor's property. This is conceded by counsel for petitioners but in arguing from the analogy of the statute in the present case counsel overlooks the point just emphasized—that the subsection serves only to make reorganization paramount to other means of liquidation.

(3) *Section 77(j)*, as already stated, authorizes the reorganization court to "enjoin or stay the commence-

ment or continuance of any judicial proceeding to enforce a lien upon the estate". The underlying purpose of subsection (j) is to free a reorganization from interference through ordinary legal proceedings. There is no suggestion that it was intended to give preference to one reorganization proceeding over another. And even though it gave such preference it does not *automatically* divest the jurisdiction of the Court whose proceeding may be stayed, but vests a discretion in the reorganization court as to whether any stay shall issue. *In re Murel Holding Corp., supra*, 75 F. (2d) 941, C. C. A. 2d, 1935; *In re Coney Island Hotel Corp.*, 76 F. (2d) 126, C. C. A. 2d, 1935. In the present case we need not inquire what the effect of such a stay would be. None has issued. Indeed, when appellants sought one at the hands of the Massachusetts Court, the court replied "I am not * * * going to get in any race with the Connecticut Court to decide practically the whole question. * * * I think you ought to present this to Judge Hincks so that he may know exactly what is going on. If Judge Hincks prefers that I decide it up here, I will do it" (R., p. 250). Not only, then, has the Massachusetts Court recognized the Connecticut Court's jurisdiction but it has gone farther and applied the rule of comity to the extent of refraining from the exercise of any paramount power that may have been committed to its discretion. This was but a proper sequel to the initial order in the Boston and Providence proceedings sanctioning continued possession and operation of the property by the New Haven trustees, so there is no need to decide whether the Massachusetts Court could, with propriety, have followed any other course.

An illustration will furnish a summary of the opposing positions. Assume that, in the course of ordinary carrier operations, a freight shipment came into the hands of the New Haven trustees, in Massachusetts. It is true, of course, that the shipment could not be treated in reorganization as part of the New Haven estate. But it is also true that the Connecticut Court would have jurisdiction to determine the claims of the estate *against that property* (*e. g.*, for freight charges) and to impose a lien upon the property for those charges. Suppose that after these charges, or some of them, had accrued (and while the shipment was still in the trustees' possession) the owner of the shipment went into 77B proceedings in Massachusetts. Under petitioners' argument the Massachusetts Court's jurisdiction would thereupon automatically supersede that of the Connecticut Court and the determination of the amount of any carrier's lien would have to be made by the former. On the other hand, we contend that the exclusive jurisdiction of the 77B debtor and its property for the purpose of its reorganization was never intended—in the case put—to oust the Connecticut Court of the jurisdiction resulting from its possession of the shipment—a jurisdiction incidental to the reorganization of another debtor a part of whose estate has been expended on the property in question for the owner's benefit.

To be sure, if the New Haven trustees relinquished the shipment and sought a personal judgment against the owner for freight charges, the principles set forth in *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. (2d) 363, C. C. A. 9th, 1936, would apply. (See Petitioners' Brief, p. 21). But that is not this case.

IV. Equity receivership precedents.

A. Introductory.

Section 77(a) confers upon the bankruptcy court "all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose". It is therefore quite proper to inquire into the extent of those powers.[22] In this inquiry, however, one thing must be borne clearly in mind. Courts of equity labored under territorial restrictions upon their power which made ancillary administration necessary for property outside that territory. The expense and delay of these ancillary proceedings was a principal reason for the adoption of Section 77. That section sought to substitute a single reorganization court for the equity court of principal administration *and all other courts acting in an ancillary capacity*, and to vest it with all the necessary powers.

There are two rules of receiverships which have a present bearing: (1) That governing the relationship between the court of principal administration and the ancillary courts, and the powers of the combined system; and (2) That governing the relationship between the congeries of courts reorganizing a railroad system and a court which had appointed a separate receiver for a company forming part of the system. We shall take these up in the order given.

[22] See comment in 52 Harvard L. Rev. 1356, 1357 (June, 1939) on the District Court's decision in the instant case.

B. In railroad receiverships the court of principal administration was the appropriate forum to decide matters relating to the general management of the trust and the general accounting of the receivers, and to determine what divisions of the system should bear losses incurred through their operation by the receivers, even where these divisions were not situated within the district of that court.

In ordering a computation of losses—if any—in just such a case the Circuit Court for the Eastern District of Nebraska said:

> "It is unnecessary to discuss or decide here whether the circuit court sitting in Colorado or Wyoming is a court of ancillary jurisdiction in the matter of this receivership. These receivers were first appointed in this court sitting in Nebraska. So far as the general management of the trust imposed upon them, the general operation of the railroad system in their charge in this circuit, and their general accounting, is concerned, they must report to and be governed by this court sitting in Nebraska. The impracticability of properly administering this great trust under any other practice, and the intolerable confusion which would result from contradictory orders regarding these subjects made in the different districts in the circuit, will commend this rule of practice to every judge within the jurisdiction; and prevent any interference or modification of the orders issued in these matters by the circuit court for the district of Nebraska, except by appeal or upon rehearing; but the circuit courts in the districts of Colorado and Wyoming have jurisdiction to hear and determine the claims of the citizens of those districts against the insolvent corporation and the receivers of it, and their determination of those matters will be equally respected by the court sitting in Nebraska. Citizens of one district will not be required to go to

another district to assert their claims against receivers appointed by the courts of both districts." *Ames* v. *Union Pacific Ry. Co.*, 60 Fed. 966, 974, C. C., E. D. Neb. 1894.

Later in the same proceedings the determination of such losses was made by the same court and declared a lien on the property of the railroad concerned, which lay wholly outside of Nebraska (*Ames* v. *Union Pacific Ry. Co.*, 74 Fed. 335, C. C. D. Neb. 1896).

A determination by the principal court of segregation accounts and the incidence of operating losses among the divisions (including leased lines) of another far flung railroad system was clearly contemplated by the order in *Central Tr. Co.* v. *Wabash St. L. & P. Ry. Co.*, 23 Fed. 863, C. C., E. D. Mo., 1885.

It is true these orders could have no *in rem* effect on extra-territorial property. The powers and process of ancillary courts were needed for such a purpose. But the ancillary courts were bound, at least by comity, to implement the decisions of the principal court. Failure to observe this rule led to such confusion in the Northern Pacific receivership that the parties chiefly concerned petitioned this Court to assign four Associate Justices to their respective circuits and settle the difference. The Court heeded the petition and the Justices reaffirmed the principles set forth above. *Farmers' Loan & Trust Co.* v. *Northern Pac. R. Co.*, 72 Fed. 26 (1896).

A similar practice obtained where the operation of a railroad system was financed through receivers' certificates (instead of being paid for out of the funds of the general trust estate as it was in the *Union Pacific* case). The issuance of such certificates was regularly

authorized by the principal court which also determined what priorities they should enjoy in the various divisions throughout the entire system. Moreover, this determination was frequently made upon mere notice to the trustees of the various mortgages affected (without any attempt to bring them in as parties to the proceedings or serve them personally), so that the basis of the power exercised could not have rested on jurisdiction *in personam*.

Examples follow:

In *Knecland* v. *Luce*, 141 U. S. 491 (1891), the District Court in Indiana passed an order making receivers' certificates a prior lien on property lying in Illinois and Indiana, but it appeared (p. 498) that a like order had been passed in Illinois.

In *Railway Steel Spring Co.* v. *Chicago & E. I. R. Co.*, a creditors' suit for receivership, the District Court in Illinois ordered the issuance of receivers' certificates which should be a lien on all the debtor's property (in Illinois and Indiana) prior to a Refunding & Improvement Mortgage. The trustee under this mortgage was not a party to the suit and appeared specially to contest the jurisdiction of the court to pass the order. Record in that case, pages 52-57, 62 (order dated Jan. 25, 1913).

In *Guaranty Tr. Co. of N. Y.* v. *Minneapolis & St. L. R. Co.*, which was started as a creditors' suit the District Court in Minnesota, upon a mere order to the mortgages (not parties) to show cause, ordered receivers' certificates to be issued which should be a prior lien on all the railroad property (a good deal of which was outside the district). Record in that case, pages 1098, 1103-6 (order dated April 29, 1924).

In *American Steel Foundries* v. *Chicago, R. I. & P. R. Co.*, a creditors' suit, a similar order was made upon mere notice to the mortgagees whose liens were disturbed, over their special appearance and objection to the jurisdiction. The order decreed that the certificates should be a lien on the entire property (lying in 14 states). Record in that case, pages 233, 285 (order dated June 28, 1915). See also pages 63, *et seq.* (similar order dated April 29, 1915).

It is probably true that these orders could not, of their own force alone, have established a lien on property outside the territorial jurisdiction of the courts which made them. *Lockport Felt Co.* v. *United Box Board & Paper Co.*, 74 N. J. Eq. 686, 70 A. 980 (1908); *cf. Pool* v. *Farmers' Loan & Tr. Co.*; 7 Tex. Civ. App. 334, 27 S. W. 744 (1894); *Farmers' Loan & Tr. Co.* v. *Northern Pac. R. Co.*, 69 Fed. 871, 879, C. C., D. Wash., 1895. Of course a court would have power to issue *in personam* orders which (if obeyed) would result in the establishment of the lien upon property situated anywhere if the court had personal jurisdiction over all parties in interest. *Robertson* v. *Howard*, 229 U. S. 254, 261 (1913); *Fall* v. *Eastin*, 215 U. S. 1 (1909). But in making the orders referred to above the courts were not relying on this principle for in many cases the requisite persons were not (and sometimes could not have been involuntarily) made parties. Rather the courts were relying on the rule that, as courts of principal administration, they had the power and duty to make all adjudications which related to the general management of the trust; and that the courts of ancillary jurisdiction were bound to give to these adjudications whatever local effect was necessary to carry them out. That the power of the principal court to issue certificates and fix their

priority was generally recognized is indicated by the unvarying practice of ancillary courts to authorize in their respective districts the liens established by the primary court.

Thus in equity receiverships there came to be a general practice under which the court that first appointed the receivers who took possession of and operated the properties assumed and was accorded the power to determine all matters relating to the general management of the trust. And such matters included the determination and allocation of earnings and losses among the various branches of the system—wherever situated—for all periods during which these branches were operated as part of the system by the common receivers.

Petitioners, however, point out that the Massachusetts court is not here an ancillary court. They are right. No tribunal in the present proceedings plays that role, for it has been done away with. The foregoing discussion serves only to show the extent of the powers conferred on the Connecticut court by Section 77(a), without regard to possible conflicts with other proceedings not ancillary in their nature. That Court is vested with all powers which an ancillary court in Massachusetts in the New Haven-Old Colony proceedings would have had; it stands in the shoes of the system of courts (principal and ancillary) which would be administering a New Haven-Old Colony receivership. We come then to the second receivership rule.

C. Where separate proceedings were instituted for the reorganization of a company forming part of the system operated by the principal receiver, the principal court was still the one to determine all questions arising out of the operation by its receivers—so long as it continued—and to charge the property with a lien for any net expense which its operation may have caused to the general estate.

The Union Pacific receivership furnished perfect analogies to the Massachusetts court and a rule for settling the very question here presented. *Ames* v. *Union Pac. Ry. Co., supra*, 74 Fed. 335, C. C. E. D. Neb. 1896; Id. 60 Fed. 966, C. C. E. D. Neb. 1894. In these cases two divisions of the system being operated by the principal receivers had separate receivers appointed for them, each in the circuit court for the district of Colorado. In both cases the separate receivers demanded surrender of the premises. In each case the demand was presented to the Nebraska court (which had first appointed the principal receivers) and in each the Nebraska court was the one to determine the amount (if any) of the deficiency incurred by the principal receivers in the operation of the division. In the case of the Gunnison Co. the existence of such a deficiency was found and adjudged to be a lien on the property (situated outside Nebraska) prior to the mortgage. (74 Fed. 335.) This then was the rule in equity receiverships. Unless it has been changed by Section 77 it governs the present controversy for the cases are parallel in every essential particular. There is no basis for finding a change. On the contrary Section 77 expressly confers on the Connecticut Court all the jurisdiction receivership courts used to wield.

V. Every practical consideration supports the decision below.

Petitioners suggest (p. 37) that practicability should be the key to jurisdiction in such a case as this. We

agree and submit that not only the decided cases but every consideration of common sense supports the decision below. The problem of determining the expenses and revenues of the various segments of an operated railroad system is a system problem, and one with which the Connecticut court in possession has been struggling for nearly five years. That court has sought and received the expert assistance of the Interstate Commerce Commission on that problem, which involves many complicated elements. Petitioners admit on page 29 of their brief that a "segregation that did not deal with the entire system revenues and expenses would be useless for purposes of reorganization". It would be equally useless for the purpose of accounting for interim operation, which was the precise purpose for which it was submitted to the Commission (R., p. 106). Petitioners are now suggesting that this Court reverse the courts below and have the Massachusetts Court, which is not operating any part of the system, attempt to adjudicate the results of operation by the Connecticut court of one segment of that system. This would indeed "allow the tail to wag the dog" (*cf.* Petitioners' Brief, p. 42). The receivership cases cited above demonstrate the impracticability of such a suggestion. Out of the long experience of those cases has grown the only workable rule, viz., that the court which is operating the system shall be given power commensurate with that duty.

The practical considerations are well summarized by the statement of Judge Learned Hand in the opinion below as follows:

"No doubt the Connecticut court might, had it

chosen, have left it to the Massachusetts court to liquidate the claim; any court having custody of a *res* may always do that. But there was the plainest justification for not doing so here. Precisely the same questions arose between the New Haven and the Old Colony and had to be dealt with in this proceeding; not only would it have involved a duplication of labor to refuse jurisdiction but it might have resulted in contradictory rulings upon the same issue. The order is affirmed."

CONCLUSION.

The decided cases and every consideration of common sense support the decision below. It should be affirmed.

Respectfully submitted;

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Counsel for Respondents.

FLEMING JAMES, JR.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 643.—October Term, 1939.

Bentley W. Warren and Charles W. Mulcahy, as the Trustees of the Property of Boston and Providence Railroad Corporation, Petitioners,
vs.
Howard S. Palmer et al., as the Trustees of the Property of the New York, New Haven and Hartford Railroad Company and Old Colony Railroad Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 29, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

The Boston and Providence Railroad Corporation in 1888 leased its property, a line of road running between Boston and Providence, for 99 years to the Old Colony Railroad. It has continued as a separate corporation, receiving and distributing its rent, and is not a subsidiary or affiliate of the New Haven or the Old Colony. In 1899 the Old Colony leased its lines, including its leasehold in the Boston and Providence, to the New York, New Haven and Hartford Railroad for 99 years. The New Haven operated its own and the leased property until it was put into reorganization under Section 77 of the Bankruptcy Act[1] in the District Court of Connecticut on October 23, 1935. The trustees of the New Haven operated the Old Colony under the lease until they rejected the lease by order of the court on June 2, 1936. Next day the Old Colony filed under Section 77 in the same Connecticut court as a subsidiary debtor, the court appointed the trustees of the New Haven trustees of the Old Colony, and on June 18, 1936, the court ordered the New Haven trustees to continue to operate the Old Colony as an integral part of the New Haven, the operation being for the account of the Old Colony. The

[1] 11 U. S. C. § 205.

order provided that, in the event leases of the Old Colony were later rejected, payments for operating the leased property and payments of rent under the lease would be deemed to have been for the account of the lessor and could be recovered from the leased property prior to any mortgage or lien thereon. On July 19, 1938, the court directed the trustees of the Old Colony to reject the lease of the Boston and Providence and to continue operation of the road for the account of the Boston and Providence pursuant to Section 77(c)(6). On August 4, 1938, the Boston and Providence was put into reorganization in the District Court of Massachusetts. Previously the system had been operating at a loss and the trustees of the New Haven and the Old Colony asked the Connecticut court to determine the amount of the deficit attributable to the Boston and Providence for the period from June 1, 1936, to December 31, 1937, and to declare that amount a lien on the Boston and Providence in favor of the New Haven and the Old Colony. On January 16, 1939, the Connecticut court decided that it had jurisdiction to grant the requested lien on the Boston and Providence, although that road was under reorganization in another bankruptcy court, and on April 20, 1939, the court entered an order fixing the amount of the deficit and declaring it a first lien on the property of the Boston and Providence. The Circuit Court of Appeals, holding that the Connecticut court had jurisdiction to determine the lien, affirmed the order of January 16, 1939, but concluded that the Boston and Providence had been given no chance to be heard on the merits of the question and remanded the later order for a determination of the "existence and amount of the obligation."[2]

The obligation on which the claimed lien is based arises, so the trustees of the New Haven and the Old Colony contend, from the operation of the Boston and Providence under Section 77(c)(6) by the Old Colony for the account of the Boston and Providence. Petitioners deny that 77(c)(6) was properly invoked and claim that the deficit is not chargeable to them. This phase of the controversy is not before us, for petitioners have brought here only the question of the Connecticut court's jurisdiction to determine the amount of the deficit chargeable to the Boston and Providence and to impose a lien on its property to secure it. If the Connecticut court has that jurisdiction, it will determine whether the deficit is chargeable

[2] 108 F. (2d) 164.

to the Boston and Providence when it determines the "existence and extent of the obligation" pursuant to the order of remand of the Court of Appeals.

The controversy has substance because of the contention of the trustees for the Boston and Providence that, as the court charged with the reorganization of that road (the Massachusetts District Court) has "exclusive jurisdiction" under Section 77(a) "of the debtor and its property wherever located," the Connecticut court cannot consider the claims of the New Haven and Old Colony trustees for operating deficits or impose a lien on the Boston and Providence property to secure them.

The lease of the Boston and Providence to the Old Colony is the type of lease covered by the order of June 18, 1936, by which the trustees of Old Colony were authorized to charge operating deficits against the lessor in the event of subsequent disaffirmance of the lease.

Railroad reorganization in bankruptcy is a field completely within the ambit of the bankruptcy powers of Congress.[3] Under the commerce clause of the Constitution Congress likewise has exercised its power to provide for the continued operation of interstate railroads such as petitioner.[4] The fact that the operator operates under a lease does not affect the force of the requirement that the operation must continue until a certificate permitting abandonment is issued by the Interstate Commerce Commission.[5] The judicial functions of the bankruptcy court and the administrative functions of the Commission work cooperatively in reorganizations.[6] Provision is made by the Bankruptcy Act[7] for the operation of leased property on sur-

[3] Continental Bank *v.* Rock Island Ry., 294 U. S. 648, 667-675.

[4] Interstate Commerce Act, § 1(18), as amended 49 U. S. C. § 1(18):

"Extension or abandonment of lines; certificate required.— . . . and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

[5] Cf. Seaboard Air Line Railways Receivers Proposed Abandonment, 202 I. C. C. 543; Norfolk S. R. Co. Receivers Abandonment, 221 I. C. C. 258; Meek and Masten, Railroad Leases and Reorganization: I, 49 Yale L. J. 626.

[6] Palmer *v.* Massachusetts, 308 U. S. 79, 87, note 14.

[7] Section 77(c)(6). "If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in

render. It is under this subsection that respondent claims to have become entitled to the amount sought in the motion for allowance and lien. This subsection modifies *pro tanto* the rule of the Interstate Commerce Act for operation.

The property of the Boston and Providence came into the possession of the trustees of the New Haven and the Old Colony and remained there during the entire time covered by the claim. These roads were lessees of the property and debtors under Section 77 in the Connecticut court. It is immaterial what title the debtors had, whether a lease or a fee. The physical property covered by the lease was in the custody of the Connecticut court by virtue of the provision of Section 77(a).[8] By virtue of subdivisions 77(c)(10) and 77(c)(6)[9] it is clear that leaseholds are in some instances to be operated by the lessee's trustees.

This Court has held "upon principles of general application" that courts having custody of property or a fund have the power "to require that expenses which have contributed either to the preservation or creation of the fund in its custody shall be paid before a general disposition among those entitled to receive it."[10] Such a power reposes in any court charged with custody of property. It is an in rem jurisdiction springing from possession of the property which is necessary in order that the court may adequately care for the property. Thus a court having custody of a ship is able to secure wharfage by virtue of its power to decree a preferential pay-

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which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended."

[8] Thompson, Trustee *v.* Magnolia Petroleum Co., No. 481 this term, decided March 25, 1940; Ex parte Baldwin, 291 U. S. 610; cf. Isaacs *v.* Hobbs Tie & T. Co., 282 U. S. 734; Green *v.* Finnegan Realty Co., 70 F. (2d) 465, 466 (C. C. A. 5th); In re Chambers, Calder & Co., 98 Fed. 865 (D. R. I.).

[9] Section 77(c)(10). "The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate." See note 7.

[10] New York Dock Co. *v.* S. S. Poyzan, 274 U. S. 117, 120, 121.

ment.[11] And here the court is able to carry out the operation of the Boston and Providence by promising or granting a lien to those who carry out the operation.

If the Connecticut court has possession of the property and operated it under Section 77(c)(6) for its owners, could it fix a lien on the property after another bankruptcy court took the administration of the property? By Section 77(c)(6) railroads in reorganization which had been operating lines under lease were allowed to reject the lease but required to continue operation of the leased lines if the lessor had no ability to operate. Thus Congress recognized the possible occurrence of the situation now before us and evinced a desire that rail service should not in such a case be interrupted. In view of the public importance of rail service, we think this subsection represents an intention to give the court charged with operation the fullest ability to secure the necessities of operation—an intention to give the operating court power to promise those having the materials, men and equipment needed for operation a first lien on the road to secure payment for the operation.[12] This in no way impairs the operation of Section 77(a) which grants to the Massachusetts court, "during the pendency of the proceedings under this section and for the purposes thereof," "exclusive jurisdiction of the debtor and its property wherever located." The "purposes" of Section 77 include the development of a "fair and equitable"[13] plan of reorganization. The Massachusetts court is left with jurisdiction to accomplish this, but is bound to recognize the priority of the lien declared by the Connecticut court. By Section 77(c)(6) the Connecticut court was given jurisdiction so long as it continued to operate the road to grant a lien for operating expenses prior to any existing claims against the road. The decision of the Court of Appeals that the Connecticut court had jurisdiction to grant the lien sought by respondent is

Affirmed.

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11 *Ibid.*

12 It may be noted that Congress did not adopt the rule of Gross v. Irving Trust Co., 289 U. S. 342, in this situation. In the Gross case property of a debtor had been in the custody of a state receivership court prior to the debtor's adjudication in ordinary bankruptcy. It was held that because of the bankruptcy court's paramount jurisdiction the administrative expenses of the receivership had to be proved in bankruptcy and could not be declared a lien by the receivership court on property in its custody.

13 § 77(e).